Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Stephen A. Arneson,

Petitioner,

v.

Kenneth S. Apfel,
Commissioner of Social Security,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Thomas C. Goldstein
BOIES & SCHILLER, LLP
5301 Wisconsin Ave., NW
Suite 570
Washington, DC 20015
(202) 237-5677

David J. Newburger
(Counsel of Record)
NEWBURGER &
VOSSMEYER
One Metropolitan Square
Suite 2400
St. Louis, MO 63102
(314) 436-4300

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred when it rejected the holding of the D.C. (per Ginsburg, J.), Fourth, and Tenth Circuits that the interest remedy of the Back Pay Act waives the federal government's sovereign immunity and is available to prevailing claimants under the Rehabilitation Act, Title VII, and the Age Discrimination in Employment Act?

2. Whether the Eighth Circuit erred in reversing a "tax enhancement" to Petitioner's back pay award, which the District Court had granted to Petitioner to compensate him for receiving the award in lump sum payments rather than spread out as annual salary?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were plaintiff-appellee Stephen A. Arneson, the Petitioner here, and defendant-appellant John J. Callahan, the then-acting Commissioner of the Social Security Administration. Kenneth S. Apfel subsequently was named Commissioner of Social Security, and accordingly has been substituted as Respondent here.

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Petition for a Writ of Certiorari
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PETITION FOR A WRIT OF CERTIORARI

Stephen A. Arneson respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

Over the past decade, the Eighth Circuit has issued three decisions in this case, although only its final ruling remains at issue. The District Court initially dismissed Petitioner's complaint (Pet. App. 1a-14a (unreported (1988))), and the Eighth Circuit reversed and remanded (*id.* 15a-27a, 879 F.2d 393 (1989)). The District Court subsequently dismissed Petitioner's complaint once again (*id.* 28a-37a, 54 Empl. Prac. Dec. (CCH) ¶ 40,301 (1990)), and the Eighth Circuit reversed

and remanded for a second time (*id.* 38a-42a, 946 F.2d 90 (1991)). The District Court then entered judgment in Petitioner's favor and fixed an award on Petitioner's claim. (*Id.* 43a-50a, 958 F. Supp. 443 (1996)). The government appealed the amount of the award, and the Eighth Circuit (per Beam, J., with Gibson and Heaney, J.J.) affirmed in part and reversed in part. (*Id.* 51a-60a, 128 F.3d 1243 (1997).)

JURISDICTION

The Eighth Circuit entered its judgment on November 7, 1997. Justice Thomas subsequently extended the time for filing this Petition to and including April 6, 1998. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes relevant to this Petition are reprinted in the appendix. (Pet App. 61a-66a.) Those statutes are the provision of the Back Pay Act that awards back pay and interest (5 U.S.C. § 5596(b)); the provisions of the Rehabilitation Act of 1973 ("Rehabilitation Act") that bar discrimination by the federal government against otherwise qualified individuals on the basis of handicap and that incorporate the rights, remedies, and procedures of Title VII of the Civil Rights Act of 1964 ("Title VII") (29 U.S.C. §§ 791(b), 794(a), 794a(a)); and the provisions of Title VII (prior to its 1991 amendment) that grant a remedy for such discrimination (42 U.S.C. §§ 2000e-5(g), 2000e-16(a), (c), (d)).

STATEMENT

This Petition involves the federal government's sovereign immunity. The government terminated Petitioner on the basis of his mental or intellectual disability and failed to adopt reasonable accommodations to allow Petitioner to remain in the workforce. The government then vigorously litigated every aspect of its liability, including the amount of Petitioner's back pay remedy. Three appeals and *thirteen years* after Petitioner filed this suit, the Eighth Circuit held that although Respondent had violated the Rehabilitation Act, entitling Petitioner to reinstatement and back pay, the government's sovereign

immunity barred two enhancements to Petitioner's back pay award: (i) interest prior to the effective date of the Civil Rights Act of 1991; and (ii) an adjustment for the higher taxes Petitioner paid when he received his back pay award in lump sums rather than spread out as annual salary.

The Petition for a Writ of Certiorari should be granted because (as the Eighth Circuit acknowledged) the decision below opens an important circuit split on the scope of the government's sovereign immunity from interest awards. The D.C. (per Ginsburg, J.), Fourth, and Tenth Circuits hold, contrary to the Eighth Circuit's decision here, that the Back Pay Act waives the federal government's sovereign immunity from interest awards in these circumstances. Moreover, there is a sharp division of authority between the judicial and executive branches of the federal government. Although the Equal Employment Opportunity Commission ("EEOC") begrudgingly obeys the mandate of the Department of Justice and does not award interest to prevailing claimants under Title VII, the Rehabilitation Act, and the Age Discrimination in Employment Act ("ADEA") (hereinafter "the anti-discrimination statutes"), nearly every court that has considered the question has rejected the Department of Justice's position and therefore will grant interest to the identical victims of discrimination if they do not accept administrative resolution of their complaints and instead file suit.

Certiorari also is warranted because the question presented recurs frequently. The Eighth Circuit's ruling in this case controls interest awards against the government under not only the Rehabilitation Act, but also Title VII and the ADEA. Petitioner acknowledges that the number of Title VII and Rehabilitation Act cases affected by the decision below has been limited (although by no means extinguished) by statutory amendment. The Civil Rights Act of 1991 provides for interest accrued after November 21, 1991 on Title VII and Rehabilitation Act claims. But that statute does *not* apply to the thousands of complaints filed against the government each year under the ADEA. The division of authority created by the decision below accordingly has substantial continuing import for age discrimination plaintiffs. Moreover, the second

question presented — whether courts may grant "tax enhancements" to prevailing civil rights plaintiffs — is unaffected by any statutory amendment.

* * * * *

From 1968 until his termination in 1983, Petitioner was a claims representative with the Social Security Administration ("SSA"). In 1978, Petitioner learned that his son has a neurological disorder that impairs motor coordination and concentration, which has been referred to in this case as "apraxia." (Pet. App. 3a.) Upon receiving an unfavorable performance evaluation at work, Petitioner suspected that he might have the same disorder, a fact that doctors subsequently confirmed. (*Id.*) Petitioner's supervisors initially granted him certain workplace accommodations for his disability, including a quieter work space and assistance in organizing his work. (*Id.* 4a.) After a 1980 transfer to a different branch office, however, Petitioner was located in a noisier and busier work area. (*Id.* 16a.)

Although Petitioner received satisfactory performance ratings until late 1981, Petitioner's supervisors came to the conclusion that his work was unsatisfactory and that he would have to be removed. In two 1982 performance evaluations, Petitioner's immediate supervisor deemed his work "unsatisfactory." (Pet. App. 17a.) By October 1982, Petitioner was advised that he would be fired if he did not apply for voluntary disability retirement. (*Id.*) When Petitioner declined to apply for disability, Respondent initiated removal proceedings. (*Id.*) He was terminated in January 1983. (*Id.*)

Petitioner sought administrative relief under the Rehabilitation Act. That statute requires that federal agencies adopt affirmative action programs for hiring disabled employees. 29 U.S.C. § 791(b). The statute further provides:

> No otherwise qualified individual with handicaps . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . . conducted by any Executive agency . . . .

Id. § 794(a). The Rehabilitation Act does not contain its own remedial provisions for claims against the federal government. Instead, the statute incorporates the "remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k) [*i.e.* Title VII]." 29 U.S.C. § 794a(a)(1).

After exhausting his administrative remedies (*see* Pet. App. 9a), Petitioner brought this suit. A federal Magistrate held a two-day bench trial, after which she dismissed the complaint on the ground that Petitioner failed to satisfy his "initial burden of establishing that he is an 'otherwise qualified individual' [under the Rehabilitation Act], that is, one, who with reasonable accommodations, is able to perform the requirements of his job despite his handicap." (*Id.* 10a.) On Petitioner's appeal, the Eighth Circuit reversed, explaining that the Magistrate had improperly placed the burden of proof on Petitioner: "Arneson is only required to provide evidence sufficient to make at least a facial showing that reasonable accommodation is possible. At that point, the burden shifts to the SSA to prove that it is unable to accommodate Arneson." (*Id.* 19a (internal citations and quotation marks omitted).) The Court of Appeals directed that, on remand, greater consideration be given to various possible accommodations, "such as a clerical assistant or transferring Arneson back to the Clayton office where a semi-private office was available." (*Id.* 21a.)[1]

On remand, the Magistrate heard additional testimony and dismissed the case once again on the ground that Petitioner is not an "otherwise qualified individual" under the Rehabilitation Act. (Pet. App. 36a.) Petitioner appealed for a second time, and the Eighth Circuit once again reversed. (*Id.* 38a.) The Court of Appeals found that the uncontradicted evidence in the case was that "very little was done to attempt to accommodate Arneson and to, thus, preserve him as a

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[1] The Court of Appeals also reversed the District Court's alternative holding that Petitioner's retirement barred his Rehabilitation Act claim (Pet. App. 18a-19a), an issue that is not relevant to this Petition.

contributing employee of the SSA," including particularly by isolating Petitioner from distractions. (*Id.* 40a-41a.) Moreover, the court recognized that SSA had substantially automated the duties of a claims representative, including through computer technology, making accommodation feasible. (*Id.* 41a.) The Court of Appeals therefore directed the District Court to enter an Order requiring Respondent to reinstate Petitioner with reasonable accommodations and to grant Petitioner back pay. (*Id.* 42a.)

On remand for yet a second time, the District Court entered judgment in Petitioner's favor and held that Petitioner was entitled to interest on his back pay award. The government conceded that Petitioner was entitled to interest accrued as of November 21, 1991, the effective date of the Civil Rights Act of 1991. That statute, among other things, overturned *Library of Congress v. Shaw* (478 U.S. 310 (1986) (holding that Title VII does not waive sovereign immunity from interest)) by expressly providing for interest on Title VII (and by extension Rehabilitation Act) back pay awards. *See* Pub. L. No. 102-166, § 114, 105 Stat. 1071, 1079 (1991).

Petitioner contended that, under the Back Pay Act, he was entitled to interest not just since November 21, 1991 but throughout the time since his 1983 termination. As amended in 1987 (Pub. L. No. 100-202, § 101(m), 101 Stat. 1329, 1329-1428), the Back Pay Act provides that employees "affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of" their pay are entitled to back pay (5 U.S.C. § 5596(b)(1)(A)(i)) and that "[a]n amount payable under paragraph (1)(A)(i) of this subsection [*i.e.*, the amount of back pay] shall be payable with interest" (*id.* § 5596(b)(2)(A)). The District Court agreed that Petitioner was entitled to interest under this provision, explaining:

> Although the Eighth Circuit has yet to decide whether the interest provision of the Back Pay Act can supplement the relief available under Title VII, other courts have held that it can. *Brown v. Secretary of the Army*, 918 F.2d 214, 218 (D.C. Cir. 1990),

> *cert. denied*, 502 U.S. 810 (1991); *Edwards* [*v. Lujan*], 40 F.3d [1152,] 1154 [(10th Cir. 1994), *cert. denied*, 516 U.S. 963 (1995)]; *Woolf* [*v. Bowles*,] 57 F.3d [407,] 410-11 [(4th Cir. 1995)]. In accordance with these well-reasoned opinions, the Court concludes that in cases falling within the Back Pay Act, the federal government's sovereign immunity against prejudgment interest on Title VII back pay awards is waived. *Edwards*, 40 F.3d at 1154; *Brown*, 912 F.2d at 218.

(Pet. App. 45a-46a.) Finding that "this case falls within the scope of the Back Pay Act," the District Court held that Petitioner was "entitled to prejudgment interest accruing from his termination on January 21, 1983" (*id.* 46a) and ordered Respondent to pay Petitioner "prejudgment interest calculated pursuant to the Back Pay Act, 5 U.S.C. § 5596(b)(2), accruing from January 21, 1983 to February 28[,] 1995 on the backpay amount of $265,688.69" (*id.* 50a). *See also* Fed. R. Civ. P. 15(b); *infra* note 2.

The District Court also added a "tax enhancement" to Petitioner's award. According to the court, the award should be adjusted to "compensate [Petitioner] for the increased income tax liability resulting from the receipt of the award" in lump sum payments, which "place [Petitioner] in an income tax bracket much higher than if he had received the back pay award as yearly salary." (Pet. App. 46a-47a.) The court adopted the enhancement based on its "wide discretion in fashioning remedies to compensate victims of discrimination." (*Id.* 47a.) The court recognized that a tax enhancement is not appropriate in every discrimination case, but found that it was warranted by the "protracted length of [this] litigation." (*Id.*)

On the government's appeal, the Eighth Circuit held that sovereign immunity barred both of the District Court's adjustments to Petitioner's back pay award. According to the Court of Appeals, "The no-interest rule provides that sovereign immunity precludes a party from recovering interest in a suit against the United States" unless Congress "expressly waive[s] the government's sovereign immunity from interest by statute

or contract or by removing the cloak of sovereignty and giving the status of a private commercial enterprise." (Pet. App. 52a (internal quotation marks and citations omitted).) The court held that Petitioner's claim did not meet this exacting standard:

> The amended Back Pay Act does not even mention Title VII or the Rehabilitation Act. This provision does not evidence Congress's clear and unequivocal consent to interest awards against the government under the Rehabilitation Act and Title VII. Had Congress desired to waive sovereign immunity from interest awards under either the Rehabilitation Act or Title VII, it would not have limited Section 5596(b)(2)(A) interest awards to amounts payable under "paragraph (1)(A)(I)."

(Pet. App. 56a.)[2] The Eighth Circuit accordingly rejected the contrary holdings of its sister circuits, which had been adopted by the District Court:

> Arneson cites three circuit decisions for the proposition that the amended Back Pay Act waives the government's sovereign immunity from interest awards in Rehabilitation Act and Title VII cases. *See Brown v. Secretary of the Army*, 918 F.2d 214 (D.C. Cir. 1990); *Edwards v. Lujan*, 40 F.3d 1152, 1154 (10th Cir. 1994) (adopting *Brown*); *Woolf v. Bowles*, 57 F.3d 407, 410 (4th Cir. 1995) (adopting *Brown*). With due respect to our sister circuits, we

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[2] This section of the Eighth Circuit's opinion, in passing, makes the following misstatement regarding the case's procedural history: "Arneson recovered back pay under Title VII's remedial provisions. He did not rely upon the Back Pay Act to recover back pay . . . ." (Pet. App. 56a.) In actuality, Petitioner expressly sought relief under the Back Pay Act (Pltf. Post-Hrg. Memo., at 7-8) and the District Court specifically considered each of the requirements for an award under the statute and concluded that "this case falls within the scope of the Back Pay Act" (Pet. App. 46a). This misstatement does not affect the question presented because the Court of Appeals did not reverse the District Court's holding that Petitioner had satisfied the prerequisites for a back pay and interest award under the Back Pay Act.

find the reasoning in those cases inconsistent with sovereign immunity and the no-interest rule.

(*Id.* 54a-55a.)[3]

The Eighth Circuit also vacated the "tax enhancement" adopted by the District Court, once again invoking sovereign immunity. The Court of Appeals concluded that tax enhancements should be held to the same exacting standard as the express waiver required for interest awards. (Pet. App. 57a.) "Nowhere within the statutory framework of the Rehabilitation Act or Title VII, has Congress expressly waived sovereign immunity from tax enhancement damages." (*Id.*) According to the Court of Appeals, "The mere fact that Congress intended that discrimination victims receive a full measure of back pay does not amount to an unequivocal and express waiver of sovereign immunity." (*Id.*)[4]

This Petition followed.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT ERRED IN ITS APPLICATION OF SOVEREIGN IMMUNITY TO DENY PETITIONER INTEREST ON HIS BACK PAY AWARD

1. The Eighth Circuit erred in holding that the "no-interest rule" bars Petitioner from receiving interest on his back pay award. Sovereign immunity shields the federal government from having to pay interest absent express congressional waiver. *See generally Library of Congress v. Shaw*, 478 U.S. 310 (1986) (describing the history of the no-

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[3] The Court of Appeals accordingly did not address whether the 1987 amendment to the Back Pay Act providing for interest applies retroactively. (Pet. App. 56a n.6.) Should this Court grant certiorari, it would, of course, have the discretion to resolve that issue or instead remand to the Eighth Circuit in the first instance.

[4] Separately, the Court of Appeals affirmed the District Court's holding that Petitioner's disability retirement benefits should not be deducted from his back pay award. (Pet. App. 57a-59a.) That aspect of the Eighth Circuit's ruling is not at issue in this Petition.

interest rule); *see also* Part IV, *infra*. But nothing more is required of Congress than a plain statement that interest is available. *Id.* at 318 n.6 (citing, *e.g.*, 28 U.S.C. § 1422 and 26 U.S.C. § 1304 as sufficient waivers of sovereign immunity from interest awards). Once an applicable waiver is identified, as is the case with the Back Pay Act's mandate that back pay "shall be payable with interest" (5 U.S.C. § 5596(b)(2)(A)), no other canon of construction interferes with the claimant's right to interest. *E.g.*, *Loeffler v. Frank*, 486 U.S. 549 (1988) (interest awarded under Title VII based on waiver of immunity embodied in the Postal Reorganization Act).

The Back Pay Act is triggered when the following conditions are satisfied:

> An employee of an agency . . . is found by appropriate authority under applicable law . . . to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all of the pay . . . of the employee.

5 U.S.C. § 5596(b)(1). Once triggered, the statute provides two forms of relief that are relevant to this case. First, the employee "is entitled . . . to receive for the period for which the personnel action was in effect . . . an amount equal to all or any part of the pay . . . which the employee normally would have earned or received." *Id.* § 5596(b)(1)(A)(i). Second, "an amount payable under paragraph (1)(A)(i) of this subsection [*i.e.*, the amount of the back pay award] shall be *payable with interest*." *Id.* § 5596(b)(2)(A) (emphasis added).

Each of the criteria for triggering the Back Pay Act is satisfied in Petitioner's case: the Eighth Circuit (in its second decision in this case (Pet. App. 38a-42a)) found that Petitioner, who was an employee of the Social Security Administration, was unjustifiably fired in violation of the Rehabilitation Act. As a result, Petitioner was entitled "to receive . . . the pay [he] normally would have earned" (*id.* § 5596(b)(1)), which in turn "shall be *payable with interest*" (*id.* § 5596(b)(2)(A) (emphasis added)). That is precisely what the District Court held when, having parsed the statute in detail, it found that "this case falls within the scope of the Back Pay Act" and that the interest on

Petitioner's back pay award would be "calculated pursuant to the Back Pay Act, 5 U.S.C. § 5596(b)(2)." (*Id.* 46a, 50a.)

Nothing in the text, legislative history, or implementing regulations suggests that Congress intended to exclude the anti-discrimination statutes from the Back Pay Act's waiver of sovereign immunity from interest awards. Instead, the Back Pay Act expressly provides for "interest" based on unjustified personnel actions as determined under any "applicable *law*, regulation, or collective bargaining agreement." 5 U.S.C. § 5596(b)(1) (emphasis added). Title VII is just such a "law." There simply is no basis for the Eighth Circuit's contrary holding "that to provide the sovereign immunity waiver absent in Title VII, the separate statute must, at a minimum, unequivocally express Congress's intent to waive sovereign immunity *under Title VII*." (Pet. App. 55a (emphasis added).) No canon of construction justifies requiring Congress, as the Eighth Circuit did in this case, to state either that the Back Pay Act is triggered by unjustified personnel actions under "applicable law, *including particularly Title VII*" or that "an amount payable under paragraph (1)(A)(1) of this subsection, *including particularly an award arising from a violation of Title VII*, shall be payable with interest."

Moreover, in *Loeffler v. Frank* (486 U.S. 549 (1988)), this Court rejected precisely the reasoning adopted by the Eighth Circuit here. Prior to *Loeffler*, this Court had held in *Library of Congress v. Shaw*, *supra*, that Title VII does not by its own terms waive the government's sovereign immunity from interest awards. The Petitioner in *Loeffler* argued that notwithstanding *Shaw*, Congress had waived the Postal Service's immunity from interest through the "sue and be sued" clause of a separate statute — the Postal Reorganization Act. In agreeing with that contention, this Court rejected the government's argument that the Postal Reorganization Act was irrelevant because the plaintiff's claim arose under Title VII, which *Shaw* plainly held did not waive sovereign immunity:

> [T]he search for an express waiver of immunity from interest within Title VII, which is all that *Shaw* was about, is unnecessary in this case. As discussed

> above, § 401 of the Postal Reorganization Act provides the waiver of sovereign immunity from interest awards against the Postal Service and § 717 of Title VII provides the cause of action under which petitioner may recover interest.

486 U.S. at 565. In this case, Title VII is the "law" (*see* 5 U.S.C. § 5596(b)(1)) that triggers Petitioner's right to relief under the Back Pay Act, including particularly "interest" on his back pay award (*see id.* § 5596(b)(2)). According to *Loeffler*, the Back Pay Act need not contain a specific reference to "Title VII" in order for its waiver of sovereign immunity from interest awards to apply to Petitioner's case.

Nor can the judgment below be sustained based on the argument (raised by Respondent's brief below but not discussed by the Eighth Circuit) that the remedies of Title VII are exclusive and therefore preclude resort to the Back Pay Act. In *Great American Federal Savings & Loan Ass'n v. Novotny* (442 U.S. 366 (1979)), the plaintiff sought to plead his Title VII claim as an actionable conspiracy to deprive him of "the equal protection of the laws" under 42 U.S.C. § 1985(3). Section 1985(3), unlike Title VII, does not require the claimant to exhaust administrative remedies. In order to preserve the comprehensive administrative scheme created by Congress, this Court held that a violation of Title VII could not form the basis for a section 1985(3) action:

> If a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of these detailed and specific provisions of the law. . . . Perhaps most importantly, the complainant could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII.

442 U.S. at 336; *see also Brown v. General Servs. Admin.*, 425 U.S. 820 (1976) (Title VII's administrative requirements cannot be circumvented through action under 42 U.S.C. § 1981).

The holding and rationale in *Novotny* do not support the judgment in this case: Petitioner's right to interest under the Back Pay Act was triggered only by a finding in his favor "by

appropriate authority under applicable law" (5 U.S.C. § 5596(b)(1)), *i.e.*, only *after* Petitioner complied with the procedural requirements of Title VII and prevailed on his claim. The District Court's decision awarding Petitioner interest under the Back Pay Act accordingly does not present a vehicle to avoid any of the requirements of Title VII.[5]

2. Petitioner also notes that the EEOC—which is the Federal agency most responsible for administering Title VII, the Rehabilitation Act, and the ADEA—strongly disagrees with the position taken by the Eighth Circuit in this case. When Congress amended the Back Pay Act in 1987, a dispute emerged within the executive branch regarding whether the relief provided under the anti-discrimination statutes was "exclusive" and therefore precluded resort to the newly enacted interest remedy. The EEOC — which administers Title VII, the Rehabilitation Act, the Equal Pay Act, and the ADEA — read the amendment to "constitute[] a waiver of sovereign immunity permitting the assessment of interest on back pay awards for which the federal government is liable" under the anti-discrimination statutes. Opinion Letter, Richard D. Komer, Legal Counsel, EEOC, to Olan Clayborne (Mar. 15, 1989) ("Clayborne Opinion"), at 2; *see also* Opinion Letter, Richard D. Komer, Legal Counsel, EEOC, to Paul L. Scham (Aug. 30, 1989), at 1; *Hall v. Lyng*, EEOC No. 05880912 (Dec. 29, 1988). In 1987, EEOC adopted a policy statement expressly providing for interest. 52 Fed. Reg. 41920 (Oct. 30, 1987), *codified at* 29 C.F.R. Pt. 1613, App. A (1989). Until late 1989, "It remain[ed] the position of the [EEOC] Office of Legal Counsel that payment of interest on federal employee discrimination complaint back pay awards which became final on or after December 22, 1987 is appropriate" (Clayborne Opinion, *supra*, at 1), and EEOC circulated proposed

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[5] There is only one arguable conflict between the back pay relief available under Title VII and the Back Pay Act. Title VII limits the claimant's relief to the two years prior to the filing of her claim (42 U.S.C. 2000e-5(g)), while the Back Pay Act contains no such limitation. This difference is accommodated, however, by simply applying the two-year limitation when Title VII claimants invoke the Back Pay Act. *E.g.*, *Brown v. Secretary of the Army*, 918 F.2d 214, 218 (CADC 1990).

regulations specifically providing for the award of interest (Memorandum, Richard D. Komer, Legal Counsel, EEOC, to Heads of All Federal Agencies (Nov. 1, 1989) ("Regulatory Modification Letter") (discussing July 1989 circulation)).

The Department of Justice flatly disagreed with EEOC. In September 1989, the Department's Office of Legal Counsel ("OLC") issued an extensive opinion letter "conclud[ing] that the United States is not liable for the payment of interest on back pay awards for employment discrimination prohibited by Title VII or the ADEA." Memorandum, William P. Barr, Assistant Attorney General, Office of Legal Counsel, to Martin L. Allday (September 18, 1989) ("OLC Memorandum"), at 2. According to OLC, "Congress intended the remedial provisions of Title VII to provide the exclusive framework by which a federal employee may obtain relief for violation of rights created by Title VII." *Id.* at 3. OLC found that the same conclusion applied under the ADEA, which directly parallels the remedial provisions of Title VII. "Congress patterned section 15 of the ADEA after section 717 of Title VII, so both sections should be construed consistently," as demonstrated by the fact that the "federal courts have unanimously concluded that Congress intended the ADEA to provide the exclusive remedy for claims of age discrimination in federal employment." *Id.* at 10.[6]

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[6] The OLC Memorandum found it conceivable that the Back Pay Act might authorize interest awards under the Rehabilitation Act because section 501 of the Rehabilitation Act had been viewed by some, in one sense, not to create an "exclusive" avenue of relief for federal employees. Specifically, some courts hold that government employees can pursue relief under not only section 501 of that statute (29 U.S.C. § 791), which expressly applies to federal employees and incorporates the remedies and procedures of Title VII, but also section 504 (*id.* § 794), which instead incorporates the remedies of *Title VI* of the Civil Rights Act of 1964. "The federal courts of appeals are split on whether section 501 provides the exclusive cause of action available to federal employees." OLC Memorandum, *supra*, at 11. *Compare Leary v. Dalton*, 58 F.3d 748, 752 (CA1 1995); *Spence v. Straw*, 54 F.3d 196, 201 (CA3 1995); *Doe v. Garrett*, 903 F.2d 1455, 1462 (CA11 1990), *cert. denied*, 499 U.S. 904 (1991); *Morgan v. U.S. Postal Serv.*, 798 F.2d 1162, 1164 n.4 (CA8 1986), *cert. denied*, 480 U.S. 948 (1987); *De La Torres v. Bolger*, 781 F.2d 1134, 1135 n.1 (CA5 1986); *and Smith v. U.S. Postal Serv.*, 742 F.2d

EEOC vigorously contested OLC's conclusion, and went so far as to write a detailed and lengthy response requesting that the Attorney General overrule OLC, but the Department of Justice refused to alter its position. According to EEOC, OLC's position "represents an incorrect interpretation of the Back Pay Act, 5 U.S.C. 5596; contains an incomplete and incorrect analysis of section 717 of the 1964 Civil Rights Act, 42 U.S.C. 2000e-16; and ignores the regulations promulgated by the Office of Personnel Management under the Back Pay Act, 5 C.F.R. 550.801-550.807." Letter, R. Gaull Silberman, Vice Chairman, EEOC, and Evan J. Kemp, Commissioner, EEOC, to Hon. Richard L. Thornburgh (Feb. 13, 1990) ("EEOC Reply"), at 2-3. When the Department of Justice adhered to its view, EEOC was forced to rescind a draft regulation providing for interest awards. *See* Regulatory Modification Letter, *supra*, at 1. "Accordingly, until receipt of the Assistant Attorney General's opinion, the Commission had issued decisions awarding interest on back pay, finding that the 1987 amendments to the Back Pay Act waived sovereign immunity for the payment of interest." EEOC Reply at 2.[7]

257, 260 (CA6 1984) (all holding section 501 not exclusive) *with Johnston v. Horne*, 875 F.2d 1415, 1420 (CA9 1989), *and Johnson v. U.S. Postal Serv.*, 861 F.2d 1475, 1478 n.8 (CA10 1988), *cert. denied*, 493 U.S. 811 (1989) (holding section 501 exclusive). The division in authority regarding the exclusivity of the Rehabilitation Act is encompassed by the question presented here because the Eighth Circuit agreed with the government that there is no difference between Title VII and the Rehabilitation Act for purposes of determining the applicability of the Back Pay Act. (Pet. App. 55a-56a.) Petitioner acknowledges, however, that even those courts that permit a government employee to sue under both section 504 and section 501 nonetheless require that the plaintiff exhaust her remedies under Title VII. *See Spence*, 54 F.3d at 201 (collecting cases).

[7] For an example of the change in position precipitated by the OLC Opinion Letter, see the facts outlined by the Sixth Circuit in *Gavette v. Brady* (No. 92-2134, 1993 U.S. App. LEXIS 25107 (Sept. 28, 1993)). The complainant, a former IRS employee, filed suit in 1984 under the Rehabilitation Act. In 1988, he settled with the IRS under an agreement providing for back pay with interest. The government subsequently reneged on the interest component because "[t]he Department of the Treasury has taken the position that the amendment to the Back Pay Act made in December 1987, does not constitute waiver of sovereign immunity from the

The substitute provision initially drafted by EEOC expressly provided that interest was *not* available. 54 Fed. Reg. 45747 (Oct. 31, 1989). But in a 1992 revision, EEOC recognized the view of commentators "that the Department of Justice's opinion is incorrect and that EEOC should award interest on back pay and attorney's fees on ADEA complaints," as well as "that the Court of Appeals for the District of Columbia [Circuit] recently ruled against the Justice Department's position, finding that the Back Pay Act waived sovereign immunity for the award of interest on backpay in employment discrimination cases." 57 Fed. Reg. 12634 (Apr. 10, 1992) (citing *Brown*, *supra*). Based on these considerations, EEOC rewrote the regulation yet again, this time to avoid deciding the issue. The revised regulation, which continues in force today, provides in uniquely unhelpful fashion: "Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived." 29 C.F.R. § 1614.501(b)(1)(ii), (c)(1).

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE DIVISION IN THE CIRCUITS AND DIVISION BETWEEN THE ADMINISTRATIVE AND JUDICIAL BRANCHES OVER THE GOVERNMENT'S IMMUNITY FROM INTEREST AWARDS IN DISCRIMINATION CASES.

The decision below expressly refuses to follow — and creates an irreconcilable conflict with — the rulings of three circuits that the "Back Pay Act waives the government's sovereign immunity from interest awards in Rehabilitation Act and Title VII cases." (Pet. App. 54a.) The leading decision on this point is *Brown v. Secretary of the Army* (918 F.2d 214 (CADC 1990) (Ginsburg, J., joined by Wald, C.J., and Sentelle, J.)), which the Eighth Circuit in this case discussed at length but refused to follow (Pet. App. 54a-55a). Then-Judge Ginsburg's opinion for the D.C. Circuit expressly rejected the

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payment of interest under the anti-discrimination statutes." After the plaintiff filed suit *again* to enforce the settlement agreement, the government settled again (thereby not technically violating its self-imposed bar on interest payments).

government's claim "that Congress confined Title VII and the Back Pay Act to totally separate spheres," reasoning that the text of the Back Pay Act contains "no hint of an exclusion of, or exemption for, federal sector Title VII adjudications." 918 F.2d at 216. The court also emphasized that *Loeffler*, *supra*, stands for the proposition that "the requisite express waiver [of sovereign immunity] can be supplied by a separate statute," such as the Back Pay Act. 918 F.2d at 216.

The government's subsequent effort to persuade the D.C. Circuit to abandon the holding of *Brown* was rebuffed. The government appealed *Lee v. Brady* (741 F. Supp. 990 (D.D.C. 1990)), which granted interest under the Back Pay Act to a Title VII and Rehabilitation Act plaintiff, arguing that the *Brown* holding was non-binding dictum. The D.C. Circuit (per curiam (Mikva, C.J., Buckley and Ginsburg, J.J.)) rejected that argument, and affirmed. *See* Br. for Appellant Sec. of Treasury, *Lee v. Baker*, No. 90-5324 (D.C. Cir.); *Lee v. Baker*, No. 90-5324, 1992 U.S. App. LEXIS 9052 (CADC Mar. 17, 1992). In another case, the District Court for the District of Columbia expressly rejected the government's assertion that *Brown* was "erroneous" and should be "disregard[ed] or overturn[ed]." *Gubisch v. Brady*, No. 88-2031 (JHG), 1992 U.S. Dist. LEXIS 4814, at *3 n.1 (D.D.C. Apr. 15, 1992).

The Tenth and Fourth Circuits have adopted the D.C. Circuit's ruling in *Brown*. In *Edwards v. Lujan* (40 F.3d 1152 (CA10 1994)), the plaintiff prevailed in his Title VII action against the Department of the Interior but the district court refused to award him interest. On appeal, the Tenth Circuit agreed with the D.C. Circuit that "'the Back Pay Act, to the extent of its coverage, waives the government's sovereign immunity against prejudgment interest on Title VII back pay awards'" (40 F.3d at 1154 (quoting *Brown*, 918 F.2d at 218)), explaining that "[w]e agree and also adopt *Brown*'s interpretation of the Back Pay Act" (*id.*). "Therefore, prejudgment interest is available if a case falls within the coverage of the Back Pay Act." *Id.*

In *Woolf v. Bowles* (57 F.3d 407 (1995)), the Fourth Circuit (per Luttig, J.) reached the same conclusion, explaining

that "[u]nlike the version of Title VII in effect [prior to its 1991 amendment], the Back Pay Act unquestionably contains an express waiver of the federal government's interest immunity." 57 F.3d at 410. The court refused to award the plaintiff interest only because her Title VII award arose from her alleged wrongful reclassification and denial of a discretionary promotion, neither of which is covered by the Back Pay Act. *Id.* at 411 (citing with approval *Brown*, *supra*, and *Edwards*, *supra*).[8]

Federal district courts generally have agreed with *Brown* and reached the opposite conclusion from the Eighth Circuit here. Both before and after the *Brown* decision, the District Court for the District of Columbia — which as the seat of government hears more such cases than any other judicial district — found that the Back Pay Act waives the government's sovereign immunity from interest under the anti-discrimination statutes. *Gubisch v. Brady*, No. 88-2031 (JHG), 1992 U.S. Dist. LEXIS 4814 (D.D.C. Apr. 15, 1992); *Trout v. Garrett*, 56 Empl. Prac. Dec. (CCH) ¶ 40,753 (D.D.C. 1990), *subsequent opinion*, 780 F. Supp. 1396, 1420 (D.D.C. 1991); *Lee v. Brady*, 741 F. Supp. 990, 991 (D.D.C. 1990), *aff'd sub nom. Lee v. Baker*, No. 90-5324, 1992 U.S. App. LEXIS 9052 (CADC Mar. 17, 1992). Several other district courts have reached the same conclusion. *Askin v. Barr*, No. 5:91-CV-29, 1992 U.S. Dist. LEXIS 14936, at *29 (W.D. Mich. July 2, 1992); *Smith v. Brady*, 744 F. Supp. 925, 926-29 (N.D. Cal. 1990); *Hearn v. Turnage*, 739 F. Supp. 1312, 1313 (E.D. Wis. 1990); *Parker v. Burnley*, 693 F. Supp. 1138, 1153, *modified on other grounds*, 703 F. Supp. 925, 926 (N.D. Ga. 1988); *Rollins v. Bennett*, No. C88-388C, 1988 U.S. Dist. LEXIS 16032 (W.D. Wash. Sept. 15, 1988). Three district court

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[8] The Second Circuit has suggested its agreement as well. *See Ward v. Brown*, 22 F.3d 516, 520 (1994) ("We read these binding cases as interpreting the Back Pay Act to provide an explicit waiver of sovereign immunity in cases covered by that Act. *Accord Brown v. Secretary of Army*, 918 F.2d 214, 216 (D.C. Cir. 1990) (Back Pay Act waives sovereign immunity against prejudgment interest on Title VII back pay awards)."). The Fifth Circuit has left the issue open. *Jackson v. Widnall*, 99 F.3d 710, 716 (CA5 1996).

decisions have reached the opposite conclusion, although one of those openly conflicts with a decision from the same district. *Roepsch v. Bentsen*, 846 F. Supp. 1363, 1371 (E.D. Wis. 1994) (rejecting *Brown*, *supra*, and *Hearn*, *supra*); *Huey v. Sullivan*, No. 87-0579-CV-W-JWO-3, 1990 U.S. Dist. LEXIS 15973 (W.D. Mo. Nov. 20, 1990), *aff'd on alternative grounds*, 971 F.2d 1362 (CA8 1992), *cert. denied*, 511 U.S. 1068 (1994); *Shafer v. Commander, Army & Air Force Exch. Serv.*, No. CA 3-7671246-R (M.D. Tex. 1989).

In sum, the conflict created by the Eighth Circuit's ruling in this case is well-developed and can be resolved only by this Court. Multiple lower courts have addressed the issue and in each instance have recognized and considered the prior rulings of each other: in *Edwards* (40 F.3d at 1154), the Tenth Circuit expressly adopted the D.C. Circuit's decision in *Brown*; in *Woolf* (57 F.3d at 411), the Fourth Circuit recognized and agreed with both *Brown* and *Edwards*; and, in this case (Pet App. 54a-55a), the Eighth Circuit acknowledged and expressly rejected all three of those prior rulings. In each instance, the courts were presented with the identical arguments for finding a waiver of sovereign immunity, but reached conflicting conclusions. *See, e.g.*, Reply Br. for Appellant, *Arneson v. Callahan*, No. 96-4183 ("But as we demonstrated in our opening brief, the D.C. Circuit was wrong in concluding that the Back Pay Act complements Title VII.")[9]

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[9] Petitioner also notes that, in recognition of the importance of the issue, this Court's practice has been to intervene quickly to resolve circuit splits presenting questions regarding the federal government's sovereign immunity from interest. Thus, in *Library of Congress v. Shaw* (478 U.S. 310 (1986)), the government successfully sought certiorari based on "a *conflict in principle* with the decisions of two other courts of appeals, which have held that language in a statute virtually identical to Section 2000e-5(k) does not make the government liable for interest." Petition for Certiorari, No. 85-54 (O.T. 1985) (emphasis added). In *Loeffler v. Frank* (486 U.S. 549 (1988)), the government acquiesced to certiorari because "the holding below squarely conflicts with the Eleventh Circuit's decision" on the same issue and "is also in tension with" a Ninth Circuit decision under the Rehabilitation Act. Memorandum for the Respondent, No. 86-1431 (O.T. 1986); *see also Loeffler*, 486 U.S. at 554 (noting that certiorari was granted "[b]ecause of a conflict with the views of the Eleventh Circuit").

Moreover, the rationale for granting certiorari in this case is even stronger than the Court's general effort to provide a uniform interpretation of federal law by resolving circuit splits. Because federal agencies apply a different standard than most federal courts, the *same victims of discrimination* now face a different interpretation of the anti-discrimination statutes depending on whether they seek only administrative relief or instead initiate litigation. Until this Court provides additional guidance, individuals will have a substantial incentive to take their discrimination claims to court (where, apart from the Eighth Circuit, interest is available) rather than allowing those claims to be finally resolved through the administrative scheme established by Congress (where interest is not available). For the same reason, the government will be pressured to agree to larger settlements of administrative complaints by the fact that interest is available should the complainant proceed to court.

III. THE QUESTION PRESENTED HAS SUBSTANTIAL CONTINUING IMPORTANCE

Certiorari also is warranted because a decision in this case will have substantial prospective effect on two classes of cases. *First*, the Back Pay Act is the only available source of interest for a large number of still-unresolved Title VII and Rehabilitation Act claims that involve discrimination prior to the effective date of the Civil Rights Act of 1991. *Second*, and perhaps more important, the Back Pay Act is the only available source of interest on claims against the government under the Age Discrimination in Employment Act, which does not itself contain an express waiver of the government's sovereign immunity from interest awards.

Despite the enactment of the Civil Rights Act of 1991, a decision in Petitioner's case would determine the availability of interest in a substantial number of lawsuits still pending under Title VII and the Rehabilitation Act. Unlike most remedial statutes, the Civil Rights Act of 1991, including its interest provision, does not apply retroactively to cover conduct prior to its effective date. *See Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Huey v. Sullivan*, 971 F.2d 1362, 1365-66 (CA8 1992), *cert. denied*, 511 U.S. 1068 (1994). According to

data published by EEOC, many federal grievances under Title VII and the Rehabilitation Act regarding discrimination prior to the effective date of the 1991 Act would not have been filed in court until late 1994 or early 1995 because of the extensive, and time-consuming, administrative review process.[10] Federal employees filed more than 10,000 such complaints in 1991 alone (*see* EEOC, *Federal Sector Report On EEO Complaints and Appeals — By Federal Agencies For Fiscal Year 1993*, at 20-21) and — even treating the fourteen-year saga of Petitioner's case as highly anomalous — a great many of those claims, as well as claims from years prior to 1991, are no doubt still pending in the federal courts.[11]

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[10] In 1993 (which, because of the time it takes to process EEO claims, is the relevant year in considering conduct from late 1991), agencies took an *average* of 366 days to resolve discrimination complaints. EEOC, *Federal Sector Report On EEO Complaints and Appeals — By Federal Agencies For Fiscal Year 1993*, at 34. Most agencies, however, took substantially longer, including Petitioner's employer the Department of Heath and Human Services (474 complaints, averaging 466 days); the Department of the Interior (432 complaints, 542 days); and the Department of Justice (458 complaints, 680 days). *Id.* at 34-36. For claims that resulted in decisions on the merits, the average time was more than 100 days longer. *Id.* at 34. After proceeding before their employing agency, complainants have the right to review by an EEOC administrative judge, and then by the EEOC itself, a process that adds approximately another year. *Id.* at 50, 63.

[11] This delay in resolving Title VII litigation also is suggested by the number of *private* lawsuits—which are not subject to such an exhaustive administrative scheme—alleging pre-amendment conduct that have been decided since the Eighth Circuit ruled in Petitioner's case. *E.g.*, *Craft v. Yellow Freight System*, No. 97-1029, 1998 U.S. App. LEXIS 2847 (CA10 Feb. 23, 1998); *Reinhold v. Virginia*, 135 F.3d 920 (CA4 1998); *Harris v. L & L Wings*, 132 F.3d 978 (CA4 Dec. 24, 1997); *Griffin v. Dillon Fam. & Youth Servs.*, No. 92-5031, 1997 U.S. App. LEXIS 35290 (CA10 Dec. 16, 1997); *Butts v. City of New York*, No. 91-Civ.-5325, 1998 U.S. Dist. LEXIS 337 (S.D.N.Y. Jan. 15, 1998); *Benjamin v. Katten, Muchin & Zavis*, No. 95-C-5077, 1998 U.S. Dist. LEXIS 510 (N.D. Ill. Jan. 12, 1998); *Olabode v. William Hecht Inc.*, No. 95-6221, 1997 U.S. Dist. LEXIS 20983 (E.D. Pa. Dec. 31, 1997); *Alexander v. Precision Machining*, No. 97-1178-JTM, 1997 U.S. Dist. LEXIS 21009 (D. Kan. Dec. 31, 1997); *Vakharia v. Swedish Covenant Hosp.*, No. 90-C-6548, 1997 U.S. Dist. LEXIS 19061 (N.D. Ill. Nov. 20, 1997).

A decision in Petitioners' case also will determine the availability of interest in cases brought under the ADEA, which (unlike Title VII as amended) does not by its own terms waive the government's sovereign immunity from interest awards.[12] The *exact* same reasoning employed by OLC in its Opinion Letter and by the Eighth Circuit in this case (and rejected by the D.C., Fourth, and Tenth Circuits) prohibits the award of interest under the ADEA. As OLC has explained, "the same analysis that shows that the Back Pay Act may not be used in a Title VII case also teaches that the ADEA serves as the exclusive means by which a federal employee may obtain relief for a violation of the rights created by that statute." OLC Memorandum, *supra*, at 10. OLC, the courts, and commentators all have recognized that ADEA section 15, which provides federal employees with a cause of action, mirrors section 717 of Title VII. *E.g.*, *id.* ("Congress patterned section 15 of the ADEA after section 717 of Title VII, so both sections should be construed consistently." (citing *Romain v. Shear*, 799 F.2d 1416, 1418 (CA9 1986)); 2 HOWARD C. EGLIT, AGE DISCRIMINATION § 9.02, at 9-7 & n.39 (2d ed. 1995) ("The third facet of § 15 of which one must be cognizant is the fact that it is modeled after a similar provision in Title VII of the Civil Rights Act of 1964. Accordingly, analogies drawn from that statutory provision are particularly relevant. . . . A number of ADEA courts have so stated." (collecting cases)).

Based exclusively on OLC's opinion letter, EEOC now has abandoned its reliance on the Back Pay Act and refuses to award interest in ADEA cases. EEOC Reply at 1; 57 Fed. Reg. 12634 (Apr. 10, 1992); *see also In re Dawes*, 69 Comp. Gen. 469 (1990). For their part, the courts uniformly have resolved claims for interest under the ADEA exclusively by reference to the same line of authority as Title VII and Rehabilitation Act claims. *Woolf v. Bowles*, *supra*, 57 F.3d at 410-11 (citing *Brown*, *supra*, and *Edwards*, *supra*); *Edwards v. Lujan*, *supra*,

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[12] In 1996, federal employees filed 7,614 age discrimination complaints. EEOC, *Federal Sector Report On EEO Complaints Processing And Appeals – By Federal Agencies For Fiscal Year 1996*, at 24. That figure is up from 4,309 complaints in 1993. *Id.* at 29.

40 F.3d at 1154 (adopting *Brown*, *supra*); *Roepsch v. Bentsen*, *supra*, 846 F. Supp. at 1370-72 (rejecting *Brown*, *supra*); *Gubisch v. Brady*, *supra*, 1992 U.S. Dist. LEXIS 4814, at *2-*3 & n.1 (applying *Brown*, *supra*); *Rollins v. Bennett*, *supra*, 1988 U.S. Dist. LEXIS 16032, at *9-*10. Petitioner is not aware of a single case or administrative interpretation drawing any distinction between the Back Pay Act's applicability to the ADEA versus Title VII or the Rehabilitation Act. *Accord* 2 EGLIT, *supra*, § 9.21, at 9-96 n.561 (rationale in *Brown* is applicable to ADEA claims).

IV. CERTIORARI SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS' DECISION REVERSING THE "TAX ENHANCEMENT" TO PETITIONER'S BACK PAY AWARD

Certiorari also should be granted on the second question presented by this Petition: whether the Court of Appeals erred in reversing the "tax enhancement" to Petitioner's back pay award. The District Court recognized that, by paying Petitioner more than a decade in back pay in lump sum payments, Respondent placed Petitioner "in an income tax bracket much higher than if he had received the back pay award as yearly salary." (Pet. App. 47a.) Accordingly, after hearing evidence, the court granted Petitioner "an additional award of $117,803 to compensate [him] for the tax consequences of the two lump sum payments." (*Id.*) The District Court adopted the enhancement based on its "wide discretion in fashioning remedies to compensate victims of discrimination." (*Id.* (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977)). Although the court recognized that "an enhancement may not be appropriate in every case," it concluded that "this case presents special circumstances because of the protracted nature of the litigation." (Pet. App. 47a.)

On Respondent's appeal, the Eighth Circuit reversed the enhancement not on the ground that it was an impermissible form of relief under Title VII, but instead on the basis of sovereign immunity. (Pet. App. 57a & n.7). According to the

Court of Appeals, "Congress must expressly and unequivocally waive sovereign immunity before a party can recover a tax enhancement award from the federal government." (*Id.* 57a.) The court required a *specific* waiver of immunity because it viewed tax enhancements as "analogous to the prejudgment interest remedy as an element of making persons whole for discrimination injuries." (*Id.* (citation omitted)) The court then reversed Petitioner's tax enhancement, finding that "[t]he mere fact that Congress intended that discrimination victims receive a full measure of back pay does not amount to an unequivocal and express waiver of sovereign immunity." (*Id.*)

The decision below conflicts with this Court's repeated admonition that Title VII makes the identical remedies available to public and private employees. Congress extended Title VII to the federal sector in 1972 for precisely this purpose, as the Court recounted in *Chandler v. Roudebush*:

> A principal goal of the amending legislation, the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, was to eradicate "'entrenched discrimination in the Federal service,'" *Morton* v. *Mancari*, 417 U. S. 535, 547, by strengthening internal safeguards and by according "[a]ggrieved federal employees or applicants . . . *the full rights* available in the courts as are granted to individuals in the private sector under title VII."

425 U.S. 840, 841 (1976) (alterations in original) (emphasis added) (quoting S. Rep. No. 92-415 (1976), at 16). Specifically, in section 717 of the statute, Congress applied Title VII's private-sector remedies to claims brought by federal employees:

> [A] § 717 suit, once commenced, is delineated by the same provisions as a suit against a private employer. Most importantly for the purposes of this case, § 717(d) explicitly incorporates § 706(g) of Title VII into the cause of action provided. Section 706(g) allows a court to "order such affirmative action as may be appropriate, includ[ing] . . . back pay . . ., or any other equitable relief as the court deems

> appropriate." 42 U.S.C. § 2000e-5(g). This provision thus governs the remedies available in both a Title VII suit brought against a federal employer under § 717 and a Title VII suit brought against a federal employer.

Loeffler, *supra*, 486 U.S. at 564 (alterations in original). Apart from exceptional circumstances, both federal and private employees therefore are entitled to the same forms of relief under Title VII.

Contrary to the reasoning of the opinion below, tax enhancement awards cannot be limited to private plaintiffs on the ground that they are "analogous to the prejudgment interest remedy." Put bluntly, interest is unique. Even when interest "would have been recoverable against a citizen" (as was the case with the pre-amended version of Title VII), "with the government *the rule is different*." *Tillson v. United States*, 100 U.S. 43, 47 (1879) (emphasis added). A rich historical tradition, which is discussed at length in both this Court's *Shaw* opinion (486 U.S. at 314-17) and the government's brief in that case, holds that only an "affirmative, clear-cut, [and] unambiguous" (*United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 590 (1947)) statement of congressional intent makes interest available on a claim against the United States. Congress is presumed to legislate with this "no-interest rule" in mind, and the omission of an express reference to interest is deemed to be purposeful. (*Shaw*, *supra*, 486 U.S. at 314-17.)[13] Thus, in addition to the requirement of a waiver of sovereign immunity from suit (such as section 717 of Title VII), "The no-interest rule provides *an added gloss of strictness* . . . ." *Id.* at 318 (emphasis added).

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[13] For example, the general rule is that "waiver of sovereign immunity is accomplished not by 'a ritualistic formula'; rather, intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 521 (1984). "But the immunity of the United States from liability *for interest* is not to be waived by policy arguments of this nature." *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 663 (1947) (emphasis added), *quoted in Shaw*, *supra*, at 321.

Because of the unique treatment accorded to interest, this Court's holding in *Library of Congress v. Shaw*, *supra*, that Title VII's *interest remedy* was available only against non-federal defendants does not support the judgment below.[14] The Eighth Circuit offered neither any citation nor any explanation for drawing an analogy between interest awards and tax enhancements. Certainly, there is no parallel canon of construction under which Congress' omission of an express right to a "tax enhancement" is held to be deliberate.

Nor are the two forms of relief so similar that the "no-interest rule" should extend to tax enhancements. "The character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term . . . ." *Shaw*, *supra*, at 322 (citation omitted). Instead, the test is whether the relief is "designed to compensated for the belated receipt of money." *Id.* But unlike interest, a tax enhancement compensates the victim for *how* (*i.e.*, in a lump sum), not *when* (*i.e.*, several years after the event), she receives her award. For example, Petitioner would seek the same tax enhancement whether he received his 1983-1996 back pay award in 1998 or instead in 2008. In either of those tax years, Petitioner would have a disproportionately large income that would place him (as the District Court explained) "in an income tax bracket much higher than if he had received the back pay award as yearly salary." (Pet. App. 47a.)[15]

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[14] *Accord* Br. for Pet'r, *Library of Congress v. Shaw*, No. 95-54 ("This case involves a principle related to but distinct from the government's basic immunity from suit: as the court below acknowledged, even when Congress has expressly permitted collection on substantive claims against the United States, the "'traditional rule' [is] that interest on [such claims] cannot be recovered" unless the awarding of interest was affirmatively and separately contemplated by Congress." (alterations in original)).

[15] In addition, while the purpose of interest is to compensate the plaintiff, the point of a tax enhancement is that it (apart from state and local taxes) will be returned directly to the federal treasury courtesy of the Internal Revenue Service. It seems odd to apply a *heightened* standard for finding a waiver of the federal government's sovereign immunity in this circumstance.

Not only does the decision below therefore conflict with this Court's precedents, but it also seriously endangers federal employees' right to a range of relief currently available in private-sector Title VII cases. The Eighth Circuit's holding that tax enhancements are "analogous to the prejudgment interest remedy *as an element of making persons whole* for discrimination injuries" (Pet. App. 57a (emphasis added) (citation omitted)) sweeps in with it an extraordinary array of relief that district courts currently invoke based on their "broad equitable powers" (*International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 364 (1977)) under Title VII.[16] For example,

> Wages are normally the major component of the back pay award but they are not the only factor that courts include in such awards. They have also included overtime pay, premium pay, shift differentials, incentive pay, and bonuses, so long as those items can be proved. Moreover, they have embraced both monetary and non-monetary fringe benefits, with non-monetary benefits converted to monetary amounts. Specifically, they have included travel expense benefits, retirement and profit sharing plan benefits, savings plan benefits, insurance benefits and employer-paid insurance premiums, and employee discounts. . . .
>
> The rationale for including these items in a back pay award is that *the purpose of the back pay remedy is to compensate and make the plaintiff whole*, and restoring the plaintiff to his or her proper employment position with no lingering discriminatory effects.

5 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 92.06(2)(b), at 92-68 to -70 (2d ed., rel. 45, Apr. 1997) (footnotes omitted) (emphasis added).

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[16] Respondent thus argued in the proceedings below (Br. for Appellant, at 29) that a specific waiver of sovereign immunity was required in order for a federal employee to receive any form of "money damages that compensates for a future anticipated loss."

For practical reasons, we suggest that the Court address not just the application of sovereign immunity to tax enhancements in federal sector cases (*see supra*) but also whether Title VII *ever* authorizes the adoption of tax enhancements.[17] It would be difficult for the Court to decide whether there is a legitimate distinction between the right of private and public plaintiffs to tax enhancements without first deciding whether tax enhancements are available in the private sector. *Accord Loeffler*, 486 U.S. at 563-64 (explaining that holding in *Shaw*, *supra*, was predicated on the fact that interest was available to private plaintiffs). We also note that the circuits are divided on over whether Title VII authorizes tax enhancements (*Compare Sears v. Atchinson, Topeka & Santa Fe Railway Co.*, 749 F.2d 1451, 1456-57 (CA10 1984) (granting enhancement), *cert. denied*, 471 U.S. 1099 (1985) *with Danshaw v. Pena*, 12 F.3d 1112, 1116 (CADC) (denying enhancement because "[w]e know of no authority for such relief, and appellee points to none"), *cert. denied*, 513 U.S. 959 (1994)), although most circuits that have addressed the question have suggested that such awards are within the district court's discretion in appropriate circumstances (*e.g.*, *Hukkanen v. International Union*, 3 F.3d 281, 287 (CA8 1993) (enhancement denied for lack of sufficient proof of tax burden); *Gelof v. Papineau*, 829 F.2d 452, 454 & n.2 (CA3 1987) (defendant conceded district court's authority; court reserves "the question whether such an award should be made in all back pay cases"); *Bli[illegible] v. Western Elec. Co.*, 731 F.2d 1473, 1480 (CA10) (enhancement denied because plaintiff could average lump sum award across five years of federal taxes), *cert. denied*, 469 U.S. 874 (1984)).

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[17] The parties joined issue on this point in the Court of Appeals, which declined to decide it. *See, e.g.*, Pet. App. 57a n.7; Br. for Appellant, at 30 (citing and discussing *Danshaw v. Pena*, 12 F.3d 1112 (CADC), *cert. denied*, 115 S. Ct. 417 (1994)); Reply Br. for Appellant, at 10 (same).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Thomas C. Goldstein
BOIES & SCHILLER, LLP
5301 Wisconsin Ave., NW
Suite 570
Washington, DC 20015
(202) 237-5677

David J. Newburger
(Counsel of Record)
NEWBURGER & VOSSMEYER
One Metropolitan Square
Suite 2400
St. Louis, MO 63102
(314) 436-4300

April 6, 1998

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

No. 84-2552 C (3)

Stephen A. Arneson,

Plaintiff,

v.

Margaret M. Heckler,
Secretary of Health and Human Services,

Defendant.

March 30, 1988 Decided and Filed

COUNSEL:

Michael J. Hoare, St. Louis, MO, for Plaintiff.
Joseph B. Moore, Assistant U.S. Attorney, St. Louis, MO, for Defendant.

CAROL E. JACKSON, UNITED STATES MAGISTRATE

This is an action brought by the plaintiff under the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.* The case was tried to this Court sitting without a jury. The Court, having considered the pleadings, the testimony of the witnesses, the documents in evidence, and being fully advised in the premises, hereby makes the following findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

(1) The plaintiff, Stephen A. Arneson, was employed by the Social Security Administration (SSA) as a claims representative from March 1968 until January 21, 1983, the effective date of his discharge. The plaintiff commenced

employment at grade level 5 and had attained grade level 10 by the time of his discharge. Throughout his employment, plaintiff's work as a claims representative was subject to periodic formal evaluation by SSA supervisory personnel. The records of these evaluations reveal that plaintiff's performance was found to be satisfactory for the period October 1, 1979 through September 30, 1981. (Pltf.'s Exhs. 2, 3, & 29).

(2) As a claims representative, plaintiff's principal duties included conducting interviews with claimants to obtain information necessary to process applications for Social Security benefits, advising claimants of their eligibility for benefits, gathering medical and work history information relevant to a claimant's application, adjudicating a claimant's entitlement to Social Security benefits and calculating the payments (if any) which a claimant is entitled to receive. As a claims representative, plaintiff was required to be knowledgeable of the various programs administered by the SSA (*e.g.*, disability, supplemental security income, retirement, etc.) as well as the laws and regulations applicable thereto. (Deft.'s Exh. P).

During the period 1979 through 1983, the SSA employed data review technicians (DRTs) who reviewed information gathered by the claims representatives in processing applications for benefits and programmed that information into a computer. The DRT position has been slated for elimination and, as a result, each claims representative will be required to type his information into a computer terminal at his desk.

(3) The plaintiff was assigned to work in the Clayton office of the SSA in June 1968. In late 1979, plaintiff was told by his immediate supervisor, Barbara Foster, that his performance was below the minimum level required to grant him the within-grade step increase which plaintiff was scheduled to receive in April 1980. Upon notifying the plaintiff of the possibility that the step increase might be withheld, Foster recommended that plaintiff contact John

McClay, the administrator of the employee counseling program of the Department of Health and Human Services.

(4) During their meeting in late 1979, plaintiff told McClay that he thought he may be suffering from a condition known as apraxia. Plaintiff testified that he first learned of this condition in 1978 when it was diagnosed in his son. Plaintiff further testified that because he and his son exhibited similar traits (*i.e.*, clumsiness, poor manual dexterity), plaintiff thought that he, too, suffered from the same disorder.

(5) Upon referral by McClay, the plaintiff was evaluated by Mary E. Bane, Ph.D., a psychologist, in November 1979. Dr. Bane found that the plaintiff had a verbal I.Q. of 127 but that his performance I.Q. was only 78, a discrepancy that led her to suspect that plaintiff was apraxic. At Dr. Bane's request, plaintiff was examined by Dixie Slight, M.A.T., OTR, who confirmed Dr. Bane's suspicion of developmental apraxia and found that the plaintiff demonstrated significantly depressed skills in motor planning along with depressed function of the left side of his body as compared to the right. (Pltf.'s Exh. 20).

(6) Apraxia is a neurological disorder of unknown etiology. In the plaintiff's case, the disorder is manifested by impaired comprehension of spoken and written language, impaired motor function, poor memory, and difficulty in acquiring and processing data. As a result of the disorder, plaintiff's reading and handwriting skills are poor; he has difficulty with clerical accuracy and organization; he is easily distracted by activity around him which impairs his ability to concentrate; and he has difficulty in simultaneously performing motor and cognitive tasks, such as writing while talking on the telephone. While apraxia is not normally a degenerative disorder, the manifestations of the condition become more apparent with aging and increased psychological and physical demands.

(7) In January 1980, Dr. Bane reported the results of the evaluation of plaintiff to McClay and Foster. In addition, Dr. Bane recommended that the plaintiff's desk be placed in

an area removed from distractions, that he be provided an assistant to help him organize his work, that he be given a work schedule that would allow him to work without being interrupted by telephone calls or other persons in the office, and that he be given a file organizer to use at his desk.

(8) In response to Dr. Bane's recommendations, the plaintiff's desk was moved into a stock room in the Clayton office and he was given a telephone headset. Additionally, plaintiff's supervisor assisted him in organizing his desk. With these changes, plaintiff's performance improved to the satisfactory level and he received his scheduled step increase in April 1980. (Pltf.'s Exh. 51).

(9) In July 1980, plaintiff was transferred at his request to the Maryland Heights branch office of the SSA. During plaintiff's tenure, there were twenty-one employees working at the branch office, compared to approximately one hundred employees at the Clayton office, and the branch office serviced considerably fewer clients.

(10) Initially, the plaintiff was assigned to work as a "teleclaims representative", taking applications for Social Security benefits by telephone. He worked alone in a private office which was also intended for use by other employees as a conference room. The plaintiff's assignment in teleclaims was only temporary as it did not require performance of the full range of duties of a claims representative. After approximately one month, plaintiff resumed his duties as a claims representative and he was relocated into the main office area with the other employees.

(11) Russell Hudson was the plaintiff's immediate supervisor at the Maryland Heights branch office. In October 1980, plaintiff was given a satisfactory rating in his performance evaluation for the period October 1, 1979 to September 30, 1980. (Pltf.'s Exh. 2). Hudson testified that he based this rating on information he had received from plaintiff's last supervisor at the Clayton office and on Hudson's personal observations of the plaintiff's work at the branch office from July to September 1980. The plaintiff

again received a satisfactory performance rating for his work during the period ending on September 30, 1981. (Pltf.'s Exh. 3).

(12) In December 1981, Hudson met with plaintiff and expressed his concerns about the quality of plaintiff's work. According to Hudson, plaintiff did not devote enough attention to the complex cases assigned to him and, as a result, the cases remained unresolved. Additionally, it was noted that the benefits applications that plaintiff prepared sometimes contained inconsistent information or were incomplete. Hudson further testified that plaintiff did not have an organized approach to his work and that he sometimes fell behind in his caseload.

(13) In January 1982, plaintiff and Hudson again discussed the deficiencies in plaintiff's work. Although the plaintiff asked for permission to take files home and for access to the office during non-working hours, both requests were denied. As a general rule, employees were prohibited from removing files from the office because of security concerns. Excepted from the rule were field representatives who made home visits to claimants. However, field representatives were nevertheless required to return the files to the office by the close of business each day. With respect to plaintiff's request for access to the office during non-working hours, the testimony established that government personnel regulations prohibited uncompensated overtime work by employees.

(14) In February 1982, Dr. Bane met with Hudson and Douglas Williams, the branch manager of the Maryland Heights office. Although Hudson knew that the plaintiff had been seeing Dr. Bane, it was not until this meeting that Hudson learned that plaintiff suffered from apraxia. Dr. Bane suggested that plaintiff's desk be located away from distractions in the office, and she testified that Hudson acknowledged that plaintiff had been allowed to take files home. According to Dr. Bane, Hudson and other supervisory

personnel at SSA were cooperative and tried to assist the plaintiff as best they could.

(15) During the period that he worked at the Maryland Heights branch office, the plaintiff was provided a headset which enabled him to use the telephone while leaving his hands free to write. Plaintiff testified that he stopped using the headset after awhile because it was awkward, did not remain in place, and it did not block out distracting office noise. The plaintiff, however, did not voice his complaints about the headset to his supervisors at the branch office.

(16) As a further effort to minimize distractions, plaintiff's desk was placed in the rear of the office away from the main route of public and employee traffic. The plaintiff's supervisor, Russell Hudson, testified that the private office that plaintiff had previously used for his teleclaims work was reserved for use as a conference room and, therefore, the plaintiff could not be assigned to the office on a permanent basis. Hudson further testified that plaintiff's placement in the private office would have been inconvenient for other employees and that plaintiff never requested that he be assigned to the private office.

(17) The plaintiff's desk was located approximately three feet away from the desks of the other claims representatives in the branch office. Although portable partitions were erected to separate the reception and work areas of the office, none were placed around the plaintiff's desk. The plaintiff was given a special telephone that did not ring at his desk. However, the telephones did ring on the desks nearby.

(18) John McClay, the employee counselor for the Department of Health and Human Services, testified that he was aware in early 1982 that the plaintiff would be discharged if his performance did not improve. In April 1982, McClay met with the plaintiff and Dr. Bane to discuss options available to the plaintiff in the event he was terminated. McClay denied that he encouraged the plaintiff to apply for

disability retirement, although this may have been one of the options they discussed.

(19) In May 1982, plaintiff received an unsatisfactory performance rating. (Deft.'s Exh. G). In June 1982, Russ Hudson submitted a Performance Improvement Plan to plaintiff identifying seven aspects of the plaintiff's work which needed improvement and advised that he would monitor plaintiff's work during the succeeding 45-day period. (Pltf.'s Exh. 8).

(20) In a memorandum dated July 23, 1982, Hudson wrote that plaintiff's overall performance was less than satisfactory in the areas of adjudicating and developing claims and in interviewing. (Pltf.'s Exh. 9). In particular, Hudson found that plaintiff did not work independently enough and that he required too much assistance from other employees. He described plaintiff's work product as having a "botched up look" due to numerous errors and wrote that plaintiff's attire was frequently "sloven." Hudson also criticized plaintiff's interviewing skills, noting that plaintiff failed to make eye contact with clients, frequently failed to record clients' responses to questions, lacked tact, did not make a personable or professional appearance, and the plaintiff sometimes appeared to lapse "into a hypnotic trance of sorts" during the interviews. Hudson further wrote that he did not believe that additional training would help the plaintiff and that the assistance plaintiff had already been given (*i.e.*, organizing his work station, assignment to the smaller-staffed branch office and professional counseling) had not seemed to help. Hudson noted that Dr. Bane had attributed plaintiff's problems to his disability for which there was no remedy. Finally, Hudson advised that he would continue to monitor plaintiff's work for sixty days, and warned that if plaintiff's performance did not improve significantly, then a recommendation for plaintiff's demotion, reassignment or removal would be made.

(21) In August 1982, Dr. Bane referred plaintiff to Vincent Stock, a vocational counselor for the Missouri Department of Education, for assistance in finding suitable

employment. On September 3, 1982, Stock met with Hudson and Douglas Williams to discuss possible accommodations that would enable plaintiff to retain his job. According to Stock, the accommodations previously provided to plaintiff (*i.e.*, private office and special telephone equipment) were only temporary and neither Hudson nor Williams appeared receptive to any permanent changes. (Pltf.'s Exh. 100). Following the meeting, Stock wrote to Williams recommending that plaintiff be given a private office, a clerical assistant to proofread his work, and that plaintiff be transferred back to the Clayton SSA office "to insure a fresh start." (Pltf.'s Exh. 11).

(22) Both Williams and Hudson testified that because of space and personnel limitations at the Maryland Heights office, the plaintiff could not be provided a private office or a clerical assistant. Furthermore, if plaintiff were transferred to the larger Clayton office, he would be faced with even more distractions.

(23) In October 1982, plaintiff received an unsatisfactory performance rating. (Deft.'s Exh. G). In a memorandum dated October 12, 1982, Douglas Williams wrote that plaintiff had been informed of the possibility of removal due to unsatisfactory performance and that plaintiff had been given one week in which to decide whether to apply for voluntary disability retirement. Williams further wrote that removal proceedings would be initiated if plaintiff elected not to apply for disability retirement. (Pltf.'s Exh. 12).

(24) On November 30, 1982 plaintiff received the Proposal to Remove based on his failure to perform at an acceptable level the claims adjudication responsibility of his job. (Pltf.'s Exh. 13). The Proposal to Remove detailed seventy-five examples of plaintiff's unsatisfactory work during the preceding year. In general, plaintiff's deficiencies included unreasonable delays in processing claims, failure to obtain necessary information from claimants or to verify information provided (*e.g.*, age, marital status, earnings), and errors in processing claims resulting in incorrect

determinations of entitlement and delays and inconvenience suffered by claimants.

(25) The plaintiff's discharge became effective January 21, 1983. (Deft.'s Exh. A). Thereafter, the plaintiff sought administrative review of the defendant's decision. In January 1984, plaintiff applied for disability retirement claiming that he was disabled due to apraxia. (Deft.'s Exh. C). His application was approved and plaintiff was awarded disability retirement benefits retroactive to January 22, 1983.

(26) In May 1986, plaintiff was examined by Simon Horenstein, M.D., a neurologist, who concluded that plaintiff suffered from a genetic disorder of language, perceptual and motor functions which is limiting, but not disabling. Dr. Horenstein testified that in order to perform his job as a claims representative, plaintiff would need a distraction-free environment in which to work, extended work hours, and an assistant to read and explain written material to him. Dr. Horenstein further testified that without accommodation plaintiff was likely to do well in jobs that did not require that he read complicated material quickly or prepare written reports quickly.

(27) In August 1986, plaintiff was examined by a second neurologist, William M. Landau, M.D. who concluded that plaintiff had significant difficulty in assembling and integrating data and that he was easily distracted by sound and movement. Dr. Landau testified that given plaintiff's integrative deficiency and distractibility and the demands of the claims representative position, the accommodations suggested by Dr. Horenstein would not improve plaintiff's job performance.

CONCLUSIONS OF LAW

Jurisdiction of the plaintiff's cause of action under 29 U.S.C. § 791 is vested in this Court pursuant to 28 U.S.C. §§ 1331 and 1343(4). The plaintiff has exhausted all administrative remedies prerequisite to maintaining this action.

See, Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985); 29 U.S.C. § 794a (a)(1).

As defined by statute, a handicapped individual is one who (a) has a physical or mental impairment which substantially limits one or more of his major life activities, (b) has a record of such impairment, or (c) is regarded as having such an impairment. 29 U.S.C. § 706(7)(B) (as amended by the 1978 amendments). The term "major life activites" includes functions such as caring for oneself, performing manual tasks, and working. 29 C.F.R. § 1613.702(c). The evidence in this case establishes that the plaintiff suffers from developmental apraxia, a disorder which impairs his motor and language functions and limits his ability to perform manual tasks and to work. Thus, the plaintiff is a handicapped individual within the meaning of the Rehabilitation Act.

The plaintiff bears the initial burden of establishing that he is an "otherwise qualified handicapped individual," that is, one, who with reasonable accommodations, is able to perform the requirements of his job despite his handicap. *See, Southeastern Community College v. Davis*, 442 U.S. 397; *Gardner v. Morris, supra*. The regulations offer guidance with respect to a federal employer's obligation to make reasonable accommodations to a qualified handicapped employee:

> (a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.
>
> (b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructurng, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of

examinations, the provision of readers and interpreters and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

29 C.F.R. § 1613.704.

Once a prima facie case has been presented, the burden shifts to the employer to prove that reasonable accommodation is not possible. *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981).

The evidence establishes that the principal elements of plaintiff's job as a claims representative were to interview claimants seeking benefits under the Social Security Act's programs, advising claimants of their eligibility for benefits, and adjudicating each claimant's entitlement under a particular program. The position necessarily involved a significant amount of interaction with the public as well as knowledge of the federal and state laws relevant to the disposition of an individual's claim. While it is not contended that the plaintiff lacked the educational or experiential capability to perform duties of a claims representative, his handicap clearly impaired his ability to do so. By reason of his apraxic condition, plaintiff was unable to assemble the information he acquired from various sources (*e.g.*, claimants [*sic*] written text) and integrate that information with that which he had acquired through his education and fourteen-year experience as claims representative. Consequently, despite his knowledge and understanding of the legal and procedural requirements for processing and

adjudicating claims, plaintiff frequently failed to get the necessary information he needed from claimants or other sources, failed to communicate information to claimants, and failed to make determinations once he had the essential information before him. Although plaintiff knew how to do his job, he was impaired in his ability to translate this knowledge into action.

Plaintiff asserts, however, that he would have been able to perform his job satisfactorily had reasonable accommodations been provided by his employer. In this regard, the evidence shows that Dr. Bane and Vincent Stock recommended to plaintiff's supervisors that plaintiff be placed in a minimally distractive environment, that he be accorded an assistant to proofread his work and assistance in organizing his work, and that plaintiff be allowed additional time in which to do his work. These recommendations were implemented in several forms. While at the Clayton office, plaintiff's desk was relocated to a stock room away from other employees and he was given a telephone headset. Thereafter, plaintiff's performance improved to the satisfactory level necessary to award him a within-grade step increase. At the Maryland Heights office, plaintiff was given a telephone headset (which he ultimately abandoned), he worked on files at home (with or without permission), and his desk was placed at the rear of the office away from the stream of office traffic. Additionally, there were significantly fewer employees at the Maryland Heights office, fewer clients, and at both offices plaintiff was assisted by DRTs who detected errors and omissions in his work. Notwithstanding these measures, plaintiff's performance deteriorated.

The Proposal to Remove recounts approximately seventy-five incidents of plaintiff's unacceptable performance during an eleven-month period in 1982. What is significant about this litany is that these incidents occurred during the same time period that the accommodations were being provided to the plaintiff. Equally significant is that the incidents described in the Proposal to Remove did not result

solely from plaintiff's clerical errors. Rather, they also resulted from plaintiff's failure to gather necessary information in the first instance, failure to recognize apparent inconsistencies in information submitted by claimants, and plaintiff's inaccuracy and delay in adjudicating claims. To the extent that plaintiff's deficiencies were attributable to apraxia, it is evident that plaintiff's handicap impaired his ability to perform the substantive aspects of his work as a claims representative to the degree that he was unable to perform the job even with reasonable accommodations. Thus, the Court concludes that plaintiff is not an otherwise qualified handicapped individual within the meaning of the Rehabilitation Act.

Even if plaintiff were an otherwise qualified handicapped person, his retirement from federal service bars his claims for back pay and reinstatement. *See, Brown v. United States*, 2 Cl. Ct. 586, 587 (1983) ("by accepting retirement, the [federal] employee has voluntarily surrendered all claims to his former position."); *Taylor v. United States*, 591 F.2d 688, 690 (Ct. Cl. 1979) ("a voluntary retirement, like a resignation, results in the employee's complete separation from the Federal service - - - a separation which, after it becomes effective, may not thereafter be revoked or withdrawn at his option."). An exception to this rule arises only when the employee's retirement was involuntary due to coercion or misrepresentation as to the effect of accepting retirement. *Taylor v. United States, supra.*

The evidence establishes that in April 1982 John McClay, the employee counselor, first suggested that plaintiff consider applying for disability retirement. Thereafter, in October 1982 plaintiff was forewarned of the initiation of removal proceedings against him and was allowed one week to decide whether to apply for retirement. The fact that plaintiff was faced with the alternative of retirement or dismissal does not constitute coercion which would render his decision involuntary. *See, Taylor v. United States, supra.* Furthermore, it is clear that plaintiff did not make his decision under compulsion as he did not elect to retire until almost one

year after his dismissal. The plaintiff was awarded disability retirement benefits retroactive to January 22, 1983, and by accepting retired status, plaintiff is precluded from obtaining the relief he seeks in this action.

For the foregoing reasons, the Court finds the issues in this cause in favor of the defendant and against the plaintiff. Therefore, judgment will be entered in favor of the defendant.

Dated this 30th day of March, 1988.

ORDER

Pursuant to the Memorandum filed herein this day,

IT IS HEREBY ORDERED that judgment be entered in favor of the defendant upon the plaintiff's complaint. Each party shall bear his own costs of action.

Dated this 30th day of March, 1988.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1712

Stephen A. Arneson,

Appellant,

v.

Margaret M. Heckler,
Secretary of Health and Human Services,

Appellee.

December 14, 1988, Submitted
July 14, 1989, Filed

Counsel who presented argument on behalf of the Appellant was Michael J. Hoare, St. Louis, Missouri.

Counsel who presented argument on behalf of the Appellee was Joseph B. Moore, St. Louis, Missouri.

McMillian and Beam, Circuit Judges, and Dean Whipple,* District Judge. Whipple, District Judge, dissenting.

BEAM, Circuit Judge

Steven [*sic*] A. Arneson appeals the dismissal of his claim against his former federal employer under the Rehabilitation Act of 1973. We remand.

I. Background

Steven [*sic*] A. Arneson was employed by the Social Security Administration (SSA) from March of 1968 through January of 1983. In 1975, he learned that he suffers from a neurological disorder known as apraxia. Arneson, the holder

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* The Honorable Dean Whipple, United States District Judge for the Western District of Missouri, sitting by designation.

of Bachelor of Arts and Masters of Business Administration degrees from the University of Iowa, as a result of the disorder, is very easily distracted by activity around him and has an impaired ability to concentrate and to simultaneously perform motor and cognitive tasks. He also has difficulty with comprehending spoken and written language and difficulty in acquiring and processing data. In addition, he has poor handwriting skills, poor reading skills and poor organizational skills.

While employed by the SSA, Arneson worked as a claims representative. The majority of his time was spent interviewing claimants to obtain information for applications for Social Security benefits, advising claimants of their eligibility for benefits, gathering work and medical histories and assisting in determining a claimant's entitlement to Social Security benefits.

Until September of 1980, Arneson worked at the SSA office in Clayton, Missouri. As a result of his diagnosis and the recommendation of a psychologist who evaluated Arneson, certain accommodations were made to provide Arneson with a work area where he could be most productive. His desk was relocated from the large area where he had worked with the other claims representatives to a three-sided room which had previously been used as a stock room. Arneson was also given a telephone headset to allow him to have both hands free while he talked on the phone as well as assistance in organizing his work. As a result of these accommodations, the quality of his work improved.

In September of 1980, Arneson voluntarily took reassignment to a new branch office in Maryland Heights, Missouri. At the Maryland Heights office Arneson's desk was placed in a large room with the other claims representatives. To provide some accommodation, his desk was placed in the back of the room where it was thought there would be less distraction. In addition, he was given a telephone headset similar to the one he used in the Clayton office and, again, received organizational assistance.

From the period of October 1, 1980, to September 30, 1981, Arneson received "satisfactory" ratings on his Employee Appraisal and Performance Rating Certification. However, on January 21, 1982, Arneson's immediate supervisor, Russell Hudson, wrote to Arneson informing him that his work was unsatisfactory. At Arneson's Performance Review on July 23, 1982, Hudson again told Arneson that his work was unsatisfactory. On October 5, 1982, Hudson and the branch manager met with Arneson and advised him to apply for voluntary disability retirement. They told Arneson they would initiate removal proceedings if he did not do so.

On November 30, 1982, the SSA issued its proposal to remove Arneson, citing approximately 75 instances of unsatisfactory performance. Arneson was terminated effective January 21, 1983.

On January 18, 1984, Arneson applied for and was granted disability retirement under the Civil Service Retirement System.

On October 31, 1984, Arneson filed this action under the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, seeking reinstatement and back pay. Following a trial, the district court entered judgment in favor of the SSA. Arneson appeals.

II. Discussion

It is Arneson's contention that he is an "otherwise qualified handicapped individual" within the meaning of the Rehabilitation Act and that the SSA failed to make the reasonable accommodations necessary to enable Arneson to do his job satisfactorily as required by the Act. He claims that had reasonable accommodations been made, he would have been able to perform his job. However, before we can deal with the substantive portion of Arneson's appeal, we must first determine whether his claim is barred because of his retirement from federal service.

A. Retirement from federal service

Upon termination, Arneson became eligible for disability retirement from the federal service. However, to secure those benefits, he had to file an application for a disability annuity within one year of the date of his separation. 5 C.F.R. §§ 831.501 and 831.502. Nearly a year after his discharge, Arneson filed the necessary application and began receiving monthly benefits. The district court held that this action bars his claim under the Rehabilitation Act. "By accepting retirement, the [federal] employee has voluntarily surrendered all claims to his former position." *Brown v. United States*, 2 Cl. Ct. 586, 587 (1983), *affirmed without opinion*, 732 F.2d 167 (Fed.Cir. 1984).

In reviewing "the right of a retired employee to reinstatement and back pay * * * 'the focus of our consideration must be the voluntariness of plaintiff's retirement * * *. If that choice was freely made, he had no right after that event to further employment by the Federal Government.'" *Taylor v. United States*, 219 Ct. Cl. 86, 591 F.2d 688, 690 (1979) (quoting *Roskos v. United States*, 213 Ct. Cl. 34, 549 F.2d 1386, 1388 (1977)). While it is true that Arneson was faced with making the difficult decision of either losing his retirement benefits or losing his ability to pursue his claim for reinstatement, "the fact that an employee * * * has to chose between two unpleasant alternatives does not make the resulting action involuntary." *Taylor*, 591 F.2d at 692.

However, the Court of Claims in *Roskos* held that the plaintiff's retirement was involuntary because the court found that the transfer, which precipitated the retirement, was unlawful. "An action is not voluntary if it is produced by government conduct which is wrongful." *Roskos*, 549 F.2d at 1389-90 (citations omitted).

Because Arneson's termination may have been unlawful, *i.e.*, in violation of the Rehabilitation Act, we cannot say that his retirement bars his claim for back pay and reinstatement. If his termination was unlawful, then he has the right to seek

this remedy regardless of his retirement. Consequently, we consider Arneson's claim under the Rehabilitation Act.

B. Otherwise qualified handicapped individual

Section 504 of the Rehabilitation Act provides:

> No otherwise qualified individual with handicaps * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity * * * conducted by any Executive agency * * *.

29 U.S.C. § 794 (Supp. IV 1986). "Section 501(b), 29 U.S.C. § 791(b), requires the federal government as an employer to develop and implement affirmative action plans on behalf of handicapped employees." *Gardner v. Morris*, 752 F.2d 1271, 1277 (8th Cir. 1985). The district court found that Arneson was a handicapped individual within the meaning of the Rehabilitation Act but found that he was not an otherwise qualified handicapped individual within the meaning of the Act. An otherwise qualified handicapped individual is one who, with reasonable accommodation, "can perform the essential functions of the position in question without endangering the health and safety of the individual or others." 29 C.F.R. § 1613.702(f) (1988).

Arneson claims that the district court was incorrect in finding that he had "the initial burden of establishing that he is an 'otherwise qualified handicapped individual,' that is, one, who with reasonable accommodations, is able to perform the requirements of his job despite his handicap." *Arneson v. Heckler*, No. 84-2552C(3), slip op. at 12 (E.D.Mo. Mar. 30, 1988). We agree. Arneson is only required to provide evidence sufficient to make "at least a facial showing that reasonable accommodation is possible." *Gardner v. Morris*, 752 F.2d at 1280. At that point, the burden shifts to the SSA to prove that it is unable to accommodate Arneson. "Once it has been established that (1) the employee has been denied employment on the basis of his handicap and (2) the particular

handicap would impair job performance unless job requirements are modified, the dispute focuses on whether the employer can reasonably accommodate the handicapped employee." *Id.* at 1279-80. It is undisputed that Arneson was terminated because of poor job performance, which performance was due to the effects of apraxia. It is also undisputed that some modifications of his job requirements are necessary to enable him to perform his job. Therefore, we must focus on what kinds of accommodations will be required and whether these are reasonable.

Arneson claims that accommodations can be made which will enable him to satisfactorily perform his job as a claims representative. The SSA argues that it has made reasonable accommodations and Arneson's work performance has not improved sufficiently. Further accommodations, the SSA contends, would be beyond the requirements of the Rehabilitation Act.

Arneson contends, based upon his consultations with a variety of psychological and occupational experts, that he could improve the performance of his job if he had the following: (1) a telephone headset to free his hands; (2) a quiet workspace to diminish distractibility; and (3) clerical assistance to check his work. In addition, it has been suggested that Arneson be allowed to modify his work hours to enable him to work in the office when there are less distractions or, in the alternative, that he be allowed to take work home. It has also been suggested that Arneson be transferred back to the Clayton office. The SSA claims that each of these alternatives, with the exception of the headset, with which Arneson has been provided, is not feasible. The SSA states that there is no private office available for Arneson at the Maryland Heights office and that to provide him with the kind of assistance that he needs, the SSA would have to hire someone who is capable of performing Arneson's job. This would result, basically, in hiring two people to do the job of one. Furthermore, it is against SSA policy, for security reasons, to allow an employee to take work home or to be in

the office after normal business hours. As for a transfer back to the Clayton office, Arneson's supervisor rejected that possibility because he felt it would not "enable [Arneson] to do a better job." Tr. at 288. Therefore, the SSA concluded, and the district court agreed, that it had made reasonable accommodations to Arneson and he was still unable to perform his job satisfactorily. As a result, the SSA contends, Arneson's termination was not in violation of the Rehabilitation Act.

Although a district court's findings of fact are not to be set aside unless clearly erroneous, we believe that this matter involves an application of the law to the undisputed factual determinations made by the court. As such, the district court's conclusions with regard to whether the accommodations made by the SSA were reasonable and whether there are additional reasonable accommodations which can be made, are reviewable *de novo*. *See Carter v. Bennett*, 840 F.2d 63, 65 (D.C.Cir. 1988).

In determining what kinds of accommodations are reasonable, courts are permitted to "take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy." 29 U.S.C. § 794a(a)(1) (1982). An unreasonable accommodation is one which "would impose undue hardship on the operation of its program." 29 C.F.R. § 1613.704(a) (1988).

We disagree with the district court's conclusion that the SSA had made reasonable accommodations and that even with reasonable accommodations, Arneson was unable to perform the job. It seems that there were some possible accommodations which were not given much credence by the court, such as a clerical assistant or transferring Arneson back to the Clayton office where a semi-private office was available. It does not appear from the record that these alternatives were adequately examined in an effort to determine the cost of such accommodations and the impact

they would have on the operation of the SSA office. For example, further development is necessary to ascertain what duties this assistant would have to perform in order to have some impact on Arneson's job performance, what the cost of such an assistant would be and whether additional funding may be available to offset the cost to the SSA. Obviously, it is beyond the expectations of the Rehabilitation Act that the SSA be required to hire another person capable of actually performing Arneson's job. On the other hand, Arneson claims that he would only need someone to proofread his work and that this person would only need to know how to read. And, presumably, the necessary proofreading could be accomplished by a part-time worker, such as a college student.

Because the record is unclear as to the specifics of the other suggested accommodations, we remand this case back to the district court for a determination of their reasonability. Specifically, we recommend that the court explore the possibility of a part-time assistant for Arneson, and if that is not a workable solution we recommend looking into the possibility of a transfer back to the Clayton office. We strongly feel that the federal government should be a model employer of the handicapped and should be required to make whatever reasonable accommodations are available.

III. Conclusion

For the foregoing reasons, the decision of the district court is reversed, and the case remanded to the district court for further proceedings consistent with this opinion.

WHIPPLE, District Judge, dissenting.

While I agree with the majority that the district court stated in its findings that "the plaintiff bears the initial burden of establishing that he is an 'otherwise qualified handicapped individual;'" that is not the way this case proceeded and the cases cited by the district court do not directly address that question.

The *Southeastern Community College v. Davis*, 442 U.S. 397, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979), case cited by the district court discusses what the term "otherwise qualified" person means, but it says nothing about who has the burden of proof to show that the employee is an "otherwise qualified individual" in the trial of a case under the Rehabilitation Act of 1973.

The *Gardner v. Morris*, 752 F.2d 1271 (8th Cir. 1985), case cited by the district court likewise says nothing about who has the burden of proof to establish whether a plaintiff is an "otherwise qualified individual" in the trial of a case under the Rehabilitation Act of 1973. The Gardner case states as the majority states that the plaintiff is required to produce sufficient evidence to make at least a facial showing that reasonable accommodation is possible. Then the burden shifts to the defendant to show that reasonable accommodation is not possible.

Both the *Southeastern* case and the *Gardner* case appear to proceed by assuming the plaintiff is an otherwise qualified individual and, when the plaintiff makes the facial showing that reasonable accommodation is possible, then shift the burden to defendant. The defendant must then show that the accommodations are not possible at all or are not economically possible, or that the individual is not "otherwise qualified" to participate in the program or to do the job the plaintiff is being denied.

This procedure was followed in this case. Arneson presented his evidence showing he could do the work as a claims representative if he had (1) a telephone headset to free his hands; (2) a quiet work space to diminish distractibility; and (3) clerical assistance to check his work. SSA then presented its witnesses to demonstrate what accommodations had been tried and why the accommodations Arneson claims he needs would not enable him to do the work of a claims representative, even if they were supplied. In other words SSA proved that, even with accommodations, Arneson was not an "otherwise qualified individual" to perform the duties

of a claims representative. SSA assumed and met its burden of proof, as the district court found in its ruling. The district court was correct.

A review of the trial transcript reveals that the district court never ordered Arneson to present evidence to prove he was an "otherwise qualified individual" during the presentation of his evidence. At no time before, during, or after the trial did Arneson raise the issue or object to the evidence he was presenting as improperly shifting the burden of proof to him.

Arneson raises it now for the first time on appeal. He should not be permitted to do so because he has waived it. *Browzin v. Catholic University of America*, 527 F.2d 843 (C.A.D.C. 1975). Further, even if Arneson were permitted to do so it should be considered harmless error because this was a court-tried case and the witnesses called by Arneson could have been called just as easily by the SSA.

I find there was more than sufficient evidence presented at the two-day trial to allow the district court to reach its decision. The majority opinion to remand the case for further development of whether SSA attempted all the accommodation suggested by Arneson is unnecessary. The evidence heard and presented by the exhibits was more than sufficient to allow the district court to render its opinion.

As to Arneson's claim that a telephone headset is needed, he testified that SSA supplied him a telephone headset but he seldom used it and the majority of the time it was kept by him on a shelf in a storage room. As to his contention that he needs a proofreader to check his work, a reading of the transcript shows that suggestion came from witness Vincent Stalk, a vocational counselor for the Missouri Department of Education at the time who identified himself as an advocate for Mr. Arneson (Tr. 93). There is no indication in the transcript that Stalk has a clear understanding of the duties of a claims representative, and his opinion was further made suspect when he testified that another type of work Arneson could do would be a position as a security guard

similar to those "we are familiar with in the Federal Courthouse." (Tr. 96). The Court can only assume that Mr. Stalk is also not familiar with the fact that security guards in federal courthouses are armed with loaded weapons and must know when and how to use them. Mr. Stalk cannot seriously believe that an individual with impairments described by the two neurologists who testified should be placed in a position with the possibility of deciding, under pressure, when to draw and use his weapon.

The district court correctly discounted Mr. Stalks' testimony and relied on the finding of the neurologists. Arneson's neurologist, Simon Hornstein, M.D., testified that appellant suffers from a "genetically determined disorder of language perceptual and motor functions * * * impaired comprehension of spoken and read [*sic*] language, poor special [*sic*] and memory, and impaired ability to predict and regulate the power output necessary for the completion of acts." (Tr. 22). Dr. Hornstein further testified this affects Arneson's ability to perform his tasks as a claims representative, in acquiring, arranging and processing data, and would have a considerable effect if he is expected to do it as everyone else does it. Dr. Hornstein stated he believes that Arneson could perform his work with the following accommodations: (1) distraction-free environment, (2) opportunity to extend his work hours on his own, and (3) use of an assistant to read and make sure he understands clearly difficult written passages.

Dr. William M. Landau, Chief of Neurology at Washington University/Barnes Hospital, testified that the term "apraxia" means a combination of disabilities. "Further stated, this is regarding a congeries or collection of symptoms which can be described in non-medical language in terms of difficulty in bringing ideas together, difficulties in writing, distractibility, motor awkwardness." (Landau Depo. p.8).

It is apparent that Arneson cannot perform his duties as a claims representative without a person assisting him to do all those acts required of a claims representative. The description

of the duties and responsibilities of the claims representative is spelled out in four single-spaced pages entered into evidence as Arneson exhibit No. 80. It is described as the keystone position in the SSA.

The claims representative must interview the claimant and take down all the relevant information to determine if the claimant is entitled to benefits, then determine the amount of benefits the claimant shall receive. A mere proofreader to check and see if Arneson had filled out the application forms correctly is and will be totally inadequate, unless the proofreader sits in on the interview with the claimant to make sure that Arneson gets the information correctly and enters it directly in the computer he must now use. (Testimony at the trial from witness Barbara Foster, an operations supervisor at SSA). (Tr. 217). Thus, there must be another employee with Arneson all the time who is knowledgeable about the qualifications for benefits, and knows how to enter them correctly in the computer -- in other words, a claims representative. This is an accommodation not anticipated or allowed under the Rehabilitation Act of 1973 "... the Act does not contemplate that a federal employer will launch major restructuring of projects and facilities disregarding expense of accommodation." *Gardner*, *supra*.

As to the suggestion that SSA consider moving Arneson back to the Clayton office, the transcript reveals that the move of Arneson to the Maryland Heights Office was in response to Dr. Bane's recommendation because it was a quieter office with fewer distractions than the Clayton office. (Tr. 272). As to Arneson's claim that he should be allowed to take files home or be allowed to work longer hours at the office, the transcript shows that Arneson indicated he would do it, "but if there was scheduled overtime. I want to be paid for it like everyone else if other people were being paid for it." (Tr. 143, lns 13-15). This belies Arneson's contention that he is willing to do anything on his own to be as productive as the other claims representatives.

The remand to the district court is not necessary, but it will enable the district court to direct the SSA to elicit from its witnesses and exhibits more thoroughly when, why and how each recommendation was tried, or why it did not work or was not feasible. Further, the record should be expanded from the witnesses regarding the duties and responsibilities of a claims representative, and what it will cost the SSA in dollars to have a claims representative on the payroll who is not productive and who, without substantial assistance in performing his job, can cause the SSA to pay out large amounts of money to claimants who are approved by Arneson when they should not have been approved.

If there is any weakness in the present record it is the evidence as to why it is not possible for Arneson to take files home to work on and why he can or cannot work on his own time at the office to keep his production up. It should also be made clearer that the way to rate employees' performances was changed in 1982 "where traits were no longer the item to be rated, it was actual job performance tied in directly with the job," (Tr. 320) to give supervisors a more accurate idea of the employees' abilities to actually perform their job by explaining in detail the differences.

I agree with the Court that the Government should bend over backwards to accommodate the handicapped. However, this does not mean the Government should be a floor mat to be walked on by individuals intent on taking advantage of the Government's perceived inability to discharge non-productive or unqualified employees because most Government supervisors will not be persistent in pursuing all the hearings and appeals an employee can pursue to stay on the payroll. The Court's ruling in this case perpetuates that reputation.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

No. 84-2552-C (3)

STEPHEN A. ARNESON,

Plaintiff,

v.

MARGARET HECKLER,

Defendant.

June 28, 1990, Filed

COUNSEL:

Michael J. Hoare; Susan L. Amato, St. Louis, Missouri.

Joseph B. Moore, Assistant U.S. Attorney, St. Louis, Missouri.

CAROL E. JACKSON, United States Magistrate.

The plaintiff brings this action against his former employer under the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq*. Following a non-jury trial in November 1986, the Court entered judgment for the defendant after determining that plaintiff was not an "otherwise qualified handicapped individual" within the meaning of the Act because he was unable to perform the duties of his job despite reasonable accommodations made by the defendant. Upon appeal, the United States Court of Appeals for the Eighth Circuit found that the record was not adequately developed as to the specifics of certain suggested accommodations and their reasonability. Thus, the appellate court remanded the matter with the specific recommendation that this Court explore the possibility of a part-time assistant for plaintiff or a transfer to the defendant's Clayton, Missouri office. *Arneson v. Heckler*, 879 F.2d 393 (8th Cir. 1989).

Pursuant to the order of remand, the Court heard additional evidence on December 19, 1989. The Court, having considered the pleadings, the testimony of the witnesses, the documents in evidence, and being fully advised in the premises hereby makes the following additional[1] findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. In 1982 and at the time of plaintiff's discharge in January 1983, the Social Security Administration (SSA) employed data review technicians (DRTs) and development clerks (DCs) in addition to claims representatives.

2. The DRTs reviewed applications, coded them for computer input and manually prepared awards for review by the claims representatives. Generally, the DRTs did not have contact with claimants for Social Security benefits prior to the application or interview but they sometimes contacted claimants if additional information was needed. DRTs were not trained to adjudicate Social Security claims. The DRT reviewed the applications and could catch complete omissions and some obvious discrepancies, such as a negative answer to whether the claimant was married in one section of the application and the listing of a spouse's name in another. Other than obvious omissions and egregious discrepancies, a DRT would not know whether information in the application was correctly written down after it was obtained from the claimant. DRTs could attain a maximum grade level of GS-7. (Pltf's Exh. 67; Defendant's Supplemental Answers to Plaintiff's Interrogatories). In 1982, there were three DRTs assigned to assist eight claims representatives at the Maryland Heights office of the SSA. (Tr. 171).[2]

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[1] The Court adopts and incorporates by reference the findings of fact set forth in its Memorandum filed on March 30, 1988.

[2] "Tr. " refers to transcript of the November 1986 trial.

3. Development clerks (DCs) acted as receptionists, set up folders, reviewed applications and obtained and reviewed proofs as directed by the claims representatives. The DCs had no input in deciding the propriety of a claim nor were they trained to adjudicate claims. DCs could attain a maximum grade level of GS-4. (Pltf's Exh. 67; Defendant's Supplemental Answers to Plaintiff's Interrogatories).

4. Claims representatives spend fifty percent of their time interviewing and advising claimants and assisting them in preparing applications. A claims representative had authority to make a final decision with respect to a claimant's application for benefits. The decisions made by the claims representatives were subject only to random quality/integrity reviews.

5. Since the first trial in 1986 the SSA has implemented the Modernized Claims Process (MCS) and Field Office Systems Enhancement (FOSE) systems. As a result the DRTs have been abolished. In addition, each claims representative now codes the claimant's information and directly enters this information into the computer system via a terminal at his/her desk.

6. The SSA employs some blind claims representatives. National funding is available for the employment of readers for the blind. The readers are employed as independent contractors at the rate of $6.00 to $7.00 per hour. The number of hours each reader is employed is dependent upon the needs of the blind claims representative to whom the reader is assigned. Readers only read material for the blind claims representative; they do not engage in interpretation or analysis. Under the MCS system blind claims representatives are also outfitted with Braille keyboards and voice synthesizers.

7. In 1982 the Clayton office of the SSA had sixty to one hundred employees and the Maryland Heights office had sixteen to twenty-two employees. More claims were handled at the Clayton office than at the Maryland Heights office. The Clayton office now consists of approximately thirty

employees. The decrease in size is attributable to the implementation of the MCS system and the opening of additional branch offices. Additionally, the Clayton office now occupies a smaller physical area.

8. Plaintiff did not request transfer from the Maryland Heights office to the Clayton office at any time prior to his termination. Douglas Williams, branch manager at the Maryland Heights office, testified that he discussed the feasibility of plaintiff's transfer to the Clayton office with Virdon Taylor, the district manager, and that both agreed that plaintiff's transfer to Clayton was not advisable because it was a larger and noisier office than the Maryland Heights office and would, therefore, pose more distractions.

9. Plaintiff testified that after January 1982 he requested, as a form of accommodation, that he be given a key to the Maryland Heights office so that he could work there during non-business hours. (Tr. 139-143). Angie Drew, a DRT who worked at the Maryland Heights office, was provided a key and usually arrived at the office prior to the commencement of business hours. The key was given to Drew to enable her to open the office in case the two supervisors who also had keys were absent. Drew was instructed not to perform any work before business hours began.

11. The plaintiff also testified that he asked for permission to take files from the office so that he could work on them at home. (*Id.*). Paula Harrison, the chief of the Human Resources Section of SSA, testified that the claimant files contained information that is subject to restrictions under the Privacy Act and Internal Revenue Service regulations.

12. In 1982 fiscal appropriations for overtime compensation were distributed to the areas based upon backlogs and staffing shortages. These appropriations then trickled down to the district and branch offices. At times, appropriations for overtime compensation were not available. Unpaid overtime was not authorized in 1982. When paid overtime work was done, a supervisor was required to be

present to assist the worker and to ensure that the work was actually being performed.

CONCLUSIONS OF LAW

On the basis of the evidence presented, the Court finds that the employment of an assistant to aid plaintiff in the performance of his work is not a reasonable accommodation and would pose an undue hardship to the Social Security Administration. The evidence establishes that a claims representative in 1982 was responsible for interviewing claimants, completing applications for benefits, providing advice with respect to a claimant's eligibility for various programs, collecting information and proofs supporting the claims, adjudicating the claims, and determining and triggering payment. Those responsibilities have not changed. The evidence also shows that plaintiff's performance of his duties as a claims representative was deficient in that he did not devote enough attention to complex cases, the applications he prepared were incomplete and/or contained inconsistent information, his work was disorganized, he required too much assistance from other employees, he had poor interviewing skills, he took too long to process claims, he failed to obtain and verify information from claimants and he made errors in determining claimants' entitlement to benefits.

In 1982 plaintiff along with other claims representatives at the Maryland Heights branch office had access to three DRTs who assisted in reviewing all applications. Plaintiff utilized this resource (indeed, one complaint was that he relied too heavily on the assistance of others), yet his performance suffered. Even assuming that plaintiff had had a DRT assigned to him exclusively, the evidence establishes that the DRTs were trained only to review applications for completeness and consistency, manually compute the dollar amount of benefits and to obtain additional information that might be needed for a claim. The DRT could provide no assistance to the plaintiff in interviewing and advising

claimants, or adjudicating claims as the DRT had no training in these areas.

Hiring a DRT exclusively for plaintiff at the 1982 wage scale would have cost the government between $13,369 and $21,527 depending upon the grade and step level of the DRT. At the time of the second trial, DRTs were no longer utilized by the Social Security Administration. However, assuming that one with similar qualifications could be hired in the same grade range (*i.e.*, GS 5 through 7), the current annual salary for such an employee would be $15,738 to $25,343. These figures do not include the cost of employee benefits paid by the government. Thus, the Court finds that employment of a DRT exclusively for plaintiff's benefit would not, in 1982 or presently, substantially impact plaintiff's performance and would impose an undue financial burden in light of the limited utility to plaintiff.

The Court has also considered whether the employment of a DC for plaintiff's exclusive use is a reasonable accommodation. Although the salary scale for a DC in 1982 and today is lower than that for a DRT, the DC would be of less use to the plaintiff than the DRT. The DCs, who performed basically clerical functions, could not manually compute the dollar amount of benefits, interview the claimant, advise the claimant or adjudicate the claim.

The plaintiff argues that hiring a reader similar to those employed for blind claims representatives would be a reasonable accommodation. However, given the distinction between the visual impairment of a blind worker and the cognitive impairment suffered by the plaintiff, it cannot be said that a reader would be able to provide the assistance required to enable plaintiff to perform his job. Absent training, a reader would have absolutely no expertise in Social Security claims procedure or determination. The reader could only read words and catch typographical errors. All analysis, interpretation, and decision making would remain with plaintiff. The act of comprehending the written word does not appear to be more problematic for plaintiff than

comprehending the spoken word. In fact, Dr. Horenstein testified that apraxia produced impaired comprehension of both spoken and written language. (Tr. 22). It is the processing of the data acquired from the words, whether spoken or written, that appears to be the problem for plaintiff. Dr. Horenstein also testified that plaintiff needed an assistant "to read and to make sure that he understands clearly difficult written passages." (Tr. 23-24). However, employing a reader to read written material to plaintiff would solve only the first of the dual duties of the assistant envisioned by Dr. Horenstein. An untrained reader could not assist plaintiff in understanding difficult written passages. Thus, an untrained reader does not appear to be a significant benefit to plaintiff nor would an untrained reader have a significant impact upon plaintiff's job performance.

Consideration is also given to the fact that the use of a reader as an assistant would, according to Dr. Horenstein, require extending the number of work hours to allow for the reading and interpretation functions. (Tr. 24, 37-38). As discussed above, unpaid overtime is against policy. Fiscal appropriations are not always available for compensated overtime, and compensated overtime requires a supervisor willing to work overtime and overtime pay for that supervisor. Finally, if plaintiff were limited to normal work hours, he would be unable to carry the full work load of a claims representative, thus necessitating the employment of an additional claims representative or requiring that existing claims representatives carry a greater load. At the time of retrial, the employment of another claims representative to assist plaintiff would cost between $26,261 and $34,136 a year, exclusive of the cost of employee benefits.

The Eighth Circuit determined that the government is not required to hire another person capable of actually performing plaintiff's job. *Arneson*, 879 F.2d at 397. The Court finds that hiring someone capable of performing plaintiff's job would be necessary for any appreciable impact upon plaintiff's job performance. The cost of hiring another claims representative

to assist plaintiff with the end result of paying two claims representatives to perform the duties of one would place an undue financial hardship upon the Social Security Administration.

The Court has also considered whether transfer to the Clayton office is a reasonable accommodation. As the testimony demonstrates, the Clayton office staff was three to five times larger than that at the Maryland Heights office and served a greater number of clients at the time of plaintiff's discharge. Thus, if transferred to the Clayton office plaintiff would have been placed in a noisier environment that would have presented more distractions. Consequently, at the point of unsatisfactory performance, as was the situation in January 1983, transfer to an environment which would have exacerbated the plaintiff's difficulties was not a reasonable alternative and was properly rejected after consideration.

The Court has also considered whether a semi-private work area would have been available to plaintiff at the Clayton office. Initially, the evidence shows that plaintiff did not request a transfer to the Clayton office. Although Vincent Stock recommended that such a transfer be "contemplated," this was only to "insure a fresh start" and not to improve plaintiff's performance except indirectly by raising his morale through placement in an environment that was not associated with failure.

More significantly, however, the evidence does not demonstrate that providing a semi-private office was a reasonable accommodation that the defendant could have made in the plaintiff's case. The evidence discloses that plaintiff was provided a semi-private work area at the Clayton office from February 1980 to June 1980. Apparently his performance improved sufficiently thereafter to justify a step increase in April 1980. Upon his transfer to the Maryland Heights office plaintiff's performance remained satisfactory for the period July 1980 through September 1981 despite his location (except for one month) in a room with other claims representatives. Further, the evidence shows that plaintiff,

except for the period immediately preceding his four month placement in a semi-private office in Clayton and the period subsequent to September 1981 consistently received satisfactory evaluations during his employment by the SSA despite placement in open work areas. Plaintiff's contention that a semi-private office in Clayton or elsewhere should have been provided to him would carry greater weight if the evidence showed that he achieved a satisfactory performance rating only when he was placed in the semi-private work area in Clayton and that he lapsed into unsatisfactory performance only after being placed in an open work area. The fact that plaintiff for a period of time received satisfactory ratings in both kinds of environments shows that a semi-private work area alone would not have enabled him to perform the duties of his job.

The record reveals that reasonable efforts were made by the defendant to accommodate plaintiff from the time that his impairment was identified until his termination. Plaintiff did not suggest or request a transfer from the Maryland Heights office prior to his termination and Vincent Stock only suggested that a transfer be contemplated in order to give plaintiff a "fresh start." While the government should be a model employer of the handicapped, accommodations need not be offered or made absent a reasonable possibility that the accommodation will allow or help the individual to perform his job duties. In this case, a transfer to Clayton did not prevent a possibility of success such that the defendant was required to locate a position at the Clayton office and offer it to plaintiff. Further, as discussed above, the alternative of hiring an assistant for the plaintiff was not a reasonable accommodation as the assistant would have to be capable of performing plaintiff's duties.

Consequently, for the foregoing reasons and those set forth in the Memorandum filed on March 30, 1988, the Court finds the issues in this cause in favor of the defendant and against the plaintiff. Therefore, judgment will be entered in favor of the defendant.

ORDER - June 28, 1990, Filed

In accordance with the Memorandum filed herewith this date, IT IS HEREBY ORDERED that judgment be entered in favor of the defendant upon the plaintiff's complaint. The parties shall bear their respective costs.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2300

Stephen A. Arneson,

Appellant,

v.

Louis W. Sullivan,
Secretary of the Department of Health and
Human Services,

Appellee.

June 13, 1991, Submitted
October 7, 1991, Filed

Counsel who presented argument on behalf of the Appellant was Michael J. Hoare of St. Louis, Missouri.

Counsel who presented argument on behalf of the Appellee was Joseph B. Moore of St. Louis, Missouri. The names of Stephen B. Higgins and Joseph B. Moore of St. Louis, Missouri, appear on the brief of the Appellee.

Beam, Circuit Judge, Floyd R. Gibson, Senior Circuit Judge, and Urbom,* District Judge.

BEAM, Circuit Judge

This dispute involving a disabled former employee and the Social Security Administration (SSA) comes before us a second time. The facts surrounding this matter are set forth in our initial opinion, *Arneson v. Heckler*, 879 F.2d 393 (8th Cir. 1989), and we adhere to the holdings and conclusions in that decision, except as they may be modified by this judgment.

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* The Honorable Warren K. Urbom, Senior United States District Judge for the District of Nebraska, sitting by designation.

We will repeat the facts only as they are necessary for our discussion of the issues raised in this new appeal. We will mention additional evidence from the record created on remand as it may be needed to explain our current rulings.

Essentially, Arneson claims that he is an "otherwise qualified handicapped individual" for whom the SSA refuses to make reasonable accommodations as required by law. We agree, and as a result, we reverse and remand this case with specific directions to the district court.

Arneson suffers from a neurological disorder known as apraxia. This disease affects his ability to discharge his duties as a claims representative for the SSA. Prior to his termination by the SSA, Arneson worked at the Clayton office in suburban St. Louis. At that location, he performed in a generally satisfactory manner. He was transferred to a smaller office in Maryland Heights and performed satisfactorily through at least two evaluation periods. His new supervisors at Maryland Heights, as time went on, viewed his work with disappointment. There is some evidence that a new employee evaluation system may have contributed to this change in perception by personnel at Maryland Heights.

To give the government the benefit of the doubt in describing apraxia, we borrow a characterization by the dissenting judge in our earlier opinion. Judge Whipple, quoting Dr. William M. Landau, Chief of Neurology at Washington University/Barnes Hospital, points out that apraxia in non-medical terms, can be described as a "difficulty in bringing ideas together, difficulties in writing, distractibility, motor awkwardness." *Arneson*, 879 F.2d at 399. Arneson claims that the major problem involves distractibility, that is the inability to bring ideas together in the noise, stress and turmoil of a busy office. This seems to be borne out by the fact that while at Clayton, he was provided a semi-private space in which to work, and his ratings were consistently satisfactory. At Maryland Heights, this accommodation was not made and his work obviously suffered.

We do not consider this set of facts to be sufficient in itself to establish that Arneson is an otherwise qualified handicapped individual within the meaning of section 504 of the Rehabilitation Act. As we stated in *Arneson*, "an otherwise qualified handicapped individual is one who, with reasonable accommodation, 'can perform the essential functions of the position in question without endangering the health and safety of the individual or others.' 29 C.F.R. § 1613.702(f) (1988)." *Arneson*, 879 F.2d at 396. We also pointed out that

> in determining what kinds of accommodations are reasonable, courts are permitted to "take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy." 29 U.S.C. § 794a(a)(1) (1982). An unreasonable accommodation is one which "would impose undue hardship on the operation of its program." 29 C.F.R. § 1613.704(a) (1988).

Id. at 397. We remanded this case because we were not satisfied that Arneson had been given the benefit of the requirements of the Rehabilitation Act. We think the evidence on remand now establishes that he is an otherwise qualified handicapped individual who has not been afforded reasonable accommodation. We think that he should be returned to the work force, if possible.

At the continued proceeding, the government called several witnesses who had responsibility for supervising Arneson or for programs for the handicapped. Their testimony, in our view, established or reinforced the existence of several critical points.

First, very little was done to attempt to accommodate Arneson and to, thus, preserve him as a contributing employee of the SSA. He is now on disability, receiving a government pension when he can very likely adequately perform services as a social security claims representative.

Second, the duties of a claims representative have now been automated. This is significant because, as stated by government witness Dorothy Boyer, an operations supervisor for the SSA, an individual with no computer experience and the ability to use two fingers can now function as a claims representative. This new system itself seems to be an accommodation that will eliminate Arneson's "motor awkwardness" and "difficulties in writing" problems as described by Dr. Landau. As noted by government witness John Nathan, the area director of the SSA for eastern Missouri since 1978, the basic elements of the claims representative position are now "interviewing, adjudication, decision making." Trial Transcript at 150.

Third, no proposals were ever suggested by Arneson's immediate superiors at Maryland Heights that would have provided him with a distraction-free environment approximating that at Clayton where Arneson's performance was satisfactory. Further, at the renewed hearing, the closest the government ever came to this issue was testimony by Nathan that he was never asked to look into providing private work space, that he does not know what it would cost, and that his only knowledge of the matter involves his having seen figures dealing with construction costs at offices he has managed. With the job now being primarily interviewing, adjudication and decision making, and with the distractibility problem solved, presumably by some accommodation through private work space, we believe that Arneson can probably do the work.

Fourth, the SSA has, laudably, instituted a program to reasonably accommodate blind individuals so that they may work as claims representatives. This includes special equipment and training, individuals to assist as "readers," and, in at least one instance, allowing a representative to carry a reduced workload. This program was undertaken because the SSA is required by law to conduct an affirmative program to accommodate handicapped individuals.

In sum, we think the government has established Arneson's case. Computers have accommodated the writing and motor awkwardness problems and the experience at Clayton seems to prove that a reasonable effort to isolate Arneson from distractions will allow him to satisfactorily carry an acceptable workload.

Accordingly, we reverse the decision of the district court and remand the matter with directions. We direct the district court to enter an order reinstating Mr. Arneson to his job as a claims representative at the SSA. We direct that he be given computer training on the new system, at least equal to that received by other handicapped employees. We direct that a reasonable amount be expended to provide a distraction-free environment in which Mr. Arneson can work. This can be at Clayton, Maryland Heights or any other SSA office within moderate proximity to Mr. Arneson's residence.

We further direct that Mr. Arneson be awarded back pay and that the district court take evidence on and enter judgment for the amount to be established. Finally, we direct that, if necessary, Arneson be given a "reader" to provide assistance to the level provided for other handicapped individuals employed by the SSA. This is not to be someone who is an alternate claims representative, only an individual who, upon reading the paper printed by the computer at the work station, can assist Arneson in his efforts to satisfactorily complete his assigned tasks.

We provide a caveat to the appellant. If, with the accommodations provided, satisfactory performance cannot be achieved, as measured by usual SSA standards, nothing in this opinion precludes the agency from terminating him for unsatisfactory performance. If, with reasonable accommodation as required by law, he cannot perform the quantity and quality of work required of other disabled representatives, discharge will be proper.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

Case No. 4:84-CV-2552 (CEJ)

STEPHEN A. ARNESON,

Plaintiff,

v.

LOUIS W. SULLIVAN,
Secretary of the Department of Health
and Human Services,

Defendant.

October 3, 1996, FILED

COUNSEL: For Plaintiff(s): David J. Newburger, NEWBURGER AND VOSSMEYER, St. Louis, MO.
Kathryn E. Denner, DENNER AND LYNN, St. Louis, MO.

For Defendant(s): Joseph B. Moore, OFFICE OF U.S. ATTORNEY, St. Louis, Mo.

CAROL E. JACKSON, UNITED STATES DISTRICT JUDGE

This matter is before the Court on the cross motions of the parties for judgment. A hearing on the motions was held on April 24, 1996. Also before the Court is the motion of the plaintiff for sanctions.

The plaintiff brings this action pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 791, *et seq*. The issue of the defendant's liability has already been decided.[1] The

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[1] In *Arneson v. Sullivan*, 946 F.2d 90 (8th Cir. 1991), the Eighth Circuit reversed and remanded the case directing the court to enter an order reinstating the plaintiff and further directing the court to determine the amount of back pay damages due.

only question remaining for the Court is a determination of the amount of back pay damages due the plaintiff. The parties agree that the plaintiff is owed basic pay in the amount of $295,555.20 and overtime pay in the amount of $6,903.67. Furthermore, neither party disputes authorized deductions for CSRS retirement contributions in the amount of $20,688.86 and thrift savings plan contributions in the amount of $9,177.65. In addition, the plaintiff received an interim payment of damages in the amount of $275,432.85 on February 28, 1995.

The issues in dispute concern interest, compensation for adverse tax consequences and a deduction for civil service disability retirement benefits. Specifically, the Court must determine whether the plaintiff is entitled to prejudgment interest pursuant to either Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16(d) ("Title VII"), or the Back Pay Act, 5 U.S.C. § 5596. The plaintiff also asks the Court to offset his enhanced tax liability resulting from the receipt of his back pay damages in two lump sum payments. Finally, the defendant argues that the disability retirement benefits the plaintiff received during the period of his termination constitute outside earnings which should be deducted from the back pay award.

I. PREJUDGMENT INTEREST

The plaintiff argues that pursuant to Title VII or, in the alternative, the Back Pay Act, 5 U.S.C. § 5596, he is entitled to prejudgment interest accruing from the date of his termination in 1983. The defendant argues that the plaintiff is only entitled to prejudgment interest accruing from November 21, 1991, the effective date of the Civil Rights Act of 1991.

Absent an express statutory waiver, sovereign immunity protects the federal government from liability for prejudgment interest on damage awards. *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986). The Rehabilitation Act of 1973 (the "Act") does not address the issue of prejudgment interest; however, the Act expressly incorporates the "remedies,

procedures and rights of Title VII." 29 U.S.C. § 794a. The Civil Rights Act of 1991 amended Title VII to authorize the award of prejudgment interest in cases against the federal government. *See* 42 U.S.C. § 2000e-16(d). This provision does not apply retroactively, however. *Huey v. Sullivan*, 971 F.2d 1362, 1365 (8th Cir. 1992), *cert. denied*, 511 U.S. 1068 (1994); *Edwards v. Lujan*, 40 F.3d 1152, 1154 n.1 (10th Cir. 1994), *cert. denied*, 116 S. Ct. 417 (1995); *Woolf v. Bowles*, 57 F.3d 407, 410 (4th Cir. 1995); *Brown v. Secretary of the Army*, 78 F.3d 645, 647 (D.C. Cir. 1996). Consequently, under Title VII the plaintiff is not entitled to interest accruing prior to the effective date of the Civil Rights Act of 1991, *i.e.*, November 21, 1991.

In the alternative, the plaintiff argues that the Back Pay Act waives the federal government's sovereign immunity against prejudgment interest. The Back Pay Act authorizes the award of back pay in cases involving an "unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances or differential of the employee." 5 U.S.C. § 5596(b)(1). In 1987, Congress amended the Back Pay Act to allow interest on back pay awards. *See* 5 U.S.C. § 5596(b)(2)(A). Such interest is recoverable only if the decision awarding the employee back pay was rendered on or after December 22, 1987, the effective date of the amendment. *Huey*, 971 F.2d at 1365.

Although the Eighth Circuit has yet to decide whether the interest provision of the Back Pay Act can supplement the relief available under Title VII, other courts have held that it can. *Brown v. Secretary of the Army*, 918 F.2d 214, 218 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 810 (1991); *Edwards*, 40 F.3d at 1154; *Woolf*, 57 F.3d at 410-11. In accordance with these well-reasoned opinions, the Court concludes that in cases falling within the scope of the Back Pay Act, the federal government's sovereign immunity against prejudgment interest on Title VII back pay awards is waived. *Edwards*, 40 F.3d at

1154; *Brown*, 918 F.2d at 218. The question then becomes whether this case is covered by the Back Pay Act.

The Back Pay Act limits its coverage to the unlawful "withdrawal or reduction" of compensation. 5 U.S.C. § 5596(b)(1). In the present case, the plaintiff was unlawfully terminated from his position in violation of the Rehabilitation Act. The Court concludes that the plaintiff's termination, which resulted in a withdrawal of all compensation, falls within the coverage of the Back Pay Act. *See Lee v. Brady*, 741 F. Supp. 990, 991 (D.D.C. 1990). Furthermore, because the decision to award back pay to the plaintiff was rendered, at the earliest, on October 7, 1991 when the Eighth Circuit remanded the case with directions that back pay be awarded, this case falls within the scope of the Back Pay Act.

Based on the foregoing the Court concludes that the plaintiff is entitled to prejudgment interest accruing from his termination on January 21, 1983 to February 28, 1995, the date of the interim payment. The interest is to be calculated in accordance with the provisions of 5 U.S.C. § 5596(b)(2) and shall be based on the sum of $265,688.20, which represents the basic back pay amount of $295,555.20 less the deductions for CSRS retirement ($20,688.86) and thrift savings plan ($9,177.65) contributions.

II. ADVERSE TAX CONSEQUENCES

The plaintiff next argues that the Court should enhance his back pay award to compensate him for the increased income tax liability resulting from the receipt of the award in two lump sum payments. He argues that as a result of the lump sum payments he is subjected to higher tax rates than he would have otherwise paid on his wages.[2]

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[2] In response, the defendant argues that the plaintiff's claim of enhanced tax liability is moot because pursuant to Revenue Ruling 93-88, back pay awarded under Title VII is excludable from gross income. The Court disagrees. In *Commissioner of Internal Revenue v. Schleier*, 515 U.S. 323 (1995), the Court rejected the commissioner's interpretation of the exclusion provision of § 104(a)(2) of the Internal Revenue Code and held

The court has wide discretion in fashioning remedies to compensate victims of discrimination. *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 364-65 (1977). In *Hukkanen v. Int'l Union of Operating Engineers*, 3 F.3d 281, 286 (8th Cir. 1993), the appeals court upheld the district court's denial of an enhancement because the plaintiff failed to present evidence of the enhancement amount or a convenient means for the court to calculate it. *Id.* at 286. The court, however, did not foreclose the possibility of such enhancements.

Although an enhancement may not be appropriate in every case, this case presents special circumstances because of the protracted nature of the litigation. *See Sears v. Atchison, Topeka & Santa Fe Ry.*, 749 F.2d 1451, 1456 (10th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985). The entry of final judgment in this case, which was initiated in 1984, will result in the award of back pay for a nine-year period. The lump sum payments place the plaintiff in an income tax bracket much higher than if he had received the back pay award as yearly salary. The government has provided no authority which would prevent the Court from making such an award. Because of the protracted length of the litigation in this case and the increased tax liability, the Court concludes that an increase in the back pay award to compensate the plaintiff for the adverse tax consequences is appropriate. *See Sears*, 749 F.2d at 1456.

Plaintiff, in Exhibits 2 and 3, provides calculations of the enhancement amount necessary to compensate him for the adverse tax consequences. Exhibit 3 is based on interest calculated through September 30, 1996, and requires an additional award of $117,803 to compensate the plaintiff for the tax consequences of the two lump sum payments. The defendant does not challenge the manner in which the tax enhancement amount was calculated. The Court concludes

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that back pay received in settlement of an Age Discrimination in Employment Act claim was not excludable from gross income. 115 S. Ct. at 2164. *See also Burke v. United States*, 504 U.S. 229 (1992).

that the plaintiff's calculation of $117,803 fairly approximates the plaintiff's increased tax liability. Therefore, his back pay award will be increased in that amount.

III. DISABILITY RETIREMENT ANNUITY

The defendant argues that the back pay award should be reduced by the amount of disability retirement benefits the plaintiff received during the period of his termination. The defendant argues that, as outside earnings, these benefits should be deducted from the back pay award. In response, the plaintiff argues that under the collateral source rule these benefits need not be deducted.

As an employee of the Social Security Administration ("SSA"), the plaintiff was entitled to participate in the Civil Service Retirement System ("CSRS"). While he was employed by the SSA, he contributed to CSRS an annual amount equal to 7 percent of his salary. The balance of the contribution to CSRS was made by his employer. CSRS benefits are paid from the Civil Service Retirement Trust Fund. After he was terminated by the SSA, plaintiff received disability retirement benefits from CSRS in the undisputed amount of $72,241.87.

The court is not required to deduct from a back pay award payments made from pension plans which are "separate from and independent of an employer's business." *Smith v. World Insurance Co.*, 38 F.3d 1456, 1465 (8th Cir. 1994). Because such payments come from a source other than the employer (a collateral source) they do not have to be deducted. *Id.* Courts may treat these pension benefits that the plaintiff received as already earned and need not deduct them. *Id.* at 1466. In the instant case, the disability retirement benefits were paid, not by the SSA, but by the CSRS, a separate and distinct entity. Furthermore, these benefits were earned by the plaintiff while he was employed by the SSA from 1968 through 1983. Consequently, the benefits fall within the collateral source rule and need not be deducted.

The Court, however, must deduct pension benefits if the back pay award includes the employer's pension contributions which would have been made but for the unlawful termination. *Id.* at 1465. In other words, if the back pay award includes a sum designed to put the plaintiff's pension account in the same position it would have been in if the plaintiff had never been discharged, then the benefits must be deducted. *Id.* at 1466. In the present case, neither party has proposed a formula for calculating back pay that would compensate the plaintiff for the pension contributions the SSA would have made if he had not been terminated. Therefore, the pension benefits the plaintiff received in the amount of $72,241.87 will not be deducted from the back pay award.

IV. CONCLUSION

For the foregoing reasons, the plaintiff will be awarded the sum of $114,962.51. This figure is arrived at by adding the plaintiff's basic pay of $295,555.20, overtime pay of $6,903.67, and the tax enhancement of $117,803 and deducting the CSRS retirement contributions ($20,688.86), thrift savings plan contributions ($9,177.65), and the February 28, 1995 interim judgment payment ($275,432.85). The plaintiff shall also receive prejudgment interest accruing from January 21, 1983 to February 28, 1995 that is based on the sum of $265,688.69 and that is to be calculated pursuant to the Bank Pay Act, 5 U.S.C. § 5596(b)(2).

An appropriate order will accompany this Memorandum.

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 3rd day of October, 1996.

ORDER

In accordance with the Memorandum filed herewith this date,

IT IS HEREBY ORDERED that the motion of the plaintiff for judgment is granted.

IT IS FURTHER ORDERED that the motion of the defendant for judgment is denied.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment for the plaintiff and against the defendant in the amount of $114,962.51, together with postjudgment interest thereon at the rate of 5.90% per annum, and prejudgment interest calculated pursuant to the Back Pay Act, 5 U.S.C. § 5596(b)(2), accruing from January 21, 1983 to February 28 1995 on the backpay amount of $265,688.69.

IT IS FURTHER ORDERED that the motion of the plaintiff for sanctions is denied.

CAROL E. JACKSON
UNITED STATES DISTRICT
JUDGE

Dated this 3rd day of October, 1996.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 96-4183/97-1192

Stephen A. Arneson,

Appellee,

v.

John J. Callahan,[1] Acting Commissioner of the Social Security Administration,

Appellant.

September 10, 1997, Submitted
November 7, 1997, Filed

Counsel who presented argument on behalf of the appellant was Stephanie R. Marcus, DOJ, of Washington, D.C. Marleigh D. Dover of Washington, D.C. appeared on the brief.

Counsel who presented argument on behalf of the appellee was David J. Newburger of St. Louis, MO.

Before BEAM, FLOYD R. GIBSON, and HEANEY, Circuit Judges.

BEAM, Circuit Judge.

The Social Security Administration appeals the amount of back pay the district court awarded Stephen A. Arneson. We affirm in part and reverse in part.

I. BACKGROUND

This dispute is before us for the third time. We will discuss only those facts relevant to this appeal. Stephen A.

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[1] John J. Callahan was named Acting Commissioner of the Social Security Administration effective March 1, 1997. He has been substituted as appellant for Shirley S. Chater pursuant to Fed. R. App. P. 43(c).

Arneson sued the Social Security Administration (SSA), claiming that it violated the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 in discharging him from his government position. Arneson suffers from a neurological disorder, apraxia, which affects his ability to concentrate and perform certain tasks.

The district court dismissed the suit and Arneson appealed. This court remanded to determine whether the SSA failed to make reasonable accommodations for Arneson's disability. *Arneson v. Heckler*, 879 F.2d 393, 400 (8th Cir. 1989). On remand, the district court entered judgment for the SSA. In *Arneson v. Sullivan*, 946 F.2d 90, 92-93 (8th Cir. 1991), we reversed that judgment, ordered the SSA to reinstate Arneson, and remanded the case for a determination of the amount of back pay that the SSA owes Arneson. The SSA now claims that the district court made three errors in that calculation.

First, the SSA contends that the district court erroneously awarded Arneson prejudgment interest accruing from his unlawful discharge. Second, the SSA contends that the district court erred in awarding Arneson additional monies to compensate him for the adverse tax consequences associated with receiving twelve years of back pay in two payments. Finally, the SSA contends that the district court erred in declining to reduce Arneson's back pay award by the amount of disability retirement benefits that Arneson received.

II. DISCUSSION

A. Prejudgment Interest

The no-interest rule provides that sovereign immunity generally precludes a party from recovering interest in a suit against the United States. *See Library of Congress v. Shaw*, 478 U.S. 310, 311, 92 L. Ed. 2d 250, 106 S. Ct. 2957 (1986). Congress may expressly waive the government's sovereign immunity from interest by statute or contract, *see, e.g., id.*, at 317, or by removing the cloak of sovereignty and giving the "status of a 'private commercial enterprise.'" *Loeffler v.*

Frank, 486 U.S. 549, 556, 100 L. Ed. 2d 549, 108 S. Ct. 1965 (1988) (quoting *Shaw*, 478 U.S. at 317 n.5).[2]

The Rehabilitation Act does not provide for prejudgment interest; however, it expressly incorporates the "remedies, procedures and rights" of Title VII. 29 U.S.C. § 794 (a)(1). Title VII of the Civil Rights Act of 1964, provides that a court may order an employer to reinstate employees "with or without back pay" or order "any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1). Arneson argues that Congress waived sovereign immunity from interest under Title VII or, alternatively, that the Back Pay Act, 5 U.S.C. § 5596, provides the necessary waiver.[3]

The Supreme Court has previously held that Title VII does not waive the federal government's sovereign immunity from interest.[4] *Shaw*, 478 U.S. at 319. The Court stated that waivers of sovereign immunity must be strictly construed in the sovereign's favor. *Id.* at 318. Furthermore, the Court stated:

> There can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the

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[2] The Supreme Court has also held that just compensation under the Fifth Amendment takings clause waives sovereign immunity from interest. Smyth v. United States, 302 U.S. 329, 363, 82 L. Ed. 294, 58 S. Ct. 248 (1937).

[3] Sovereign immunity is a jurisdictional question which the government can raise at any time. *See, e.g., Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 793 (8th Cir. 1996), *cert. denied*, 137 L. Ed. 2d 327, 117 S. Ct. 1245 (1997). Thus, we reject Arneson's argument that the government waived its claim of sovereign immunity by failing to immediately appeal the district court's order awarding Arneson interest on his back pay award.

[4] In Shaw, the plaintiff argued that Congress waived sovereign immunity from interest under Title VII because Title VII holds the United States "liable 'the same as a private person' for 'costs,' including 'a reasonable attorney's fee.'" *Shaw*, 478 U.S. at 317-18 (quoting 42 U.S.C. § 2000e-5(k)).

> recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

Id. (alternation in original) (quoting *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659, 91 L. Ed. 577, 67 S. Ct. 601 (1947)). *See also, e.g., Miller v. Alamo*, 992 F.2d 766 (8th Cir. 1993) (Congress must clearly and unequivocally waive the government's sovereign immunity).

After *Shaw*, Congress amended Title VII, expressly waiving sovereign immunity from interest. 42 U.S.C. § 2000e-16(d). Neither party disputes that the district court properly awarded Arneson interest beginning on November 21, 1991, the amendment's effective date. However, the 1991 amendment does not apply retroactively. *See Huey v. Sullivan*, 971 F.2d 1362, 1365-66 (8th Cir. 1992). Nonetheless, Arneson argues that he is entitled to interest on his back pay award from January 21, 1983, through November 21, 1991, because the Back Pay Act waives sovereign immunity.

Back Pay Act generally provides certain federal agency employees with a monetary remedy for "unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction" of the employees' pay. 5 U.S.C. § 5596(b)(1). The Back Pay Act did not provide for interest against the United States until Congress amended it in 1987. 5 U.S.C. § 5596(b)(2)(A).

Arneson cites three circuit decisions for the proposition that the amended Back Pay Act waives the government's sovereign immunity from interest awards in Rehabilitation Act and Title VII cases. *See Brown v. Secretary of the Army*, 918 F.2d 214 (D.C. Cir. 1990); *Edwards v. Lujan*, 40 F.3d 1152, 1154 (10th Cir. 1994) (adopting *Brown*); *Woolf v. Bowles*, 57 F.3d 407, 410 (4th Cir. 1995) (adopting *Brown*). With due respect to our sister circuits, we find the reasoning

in those cases inconsistent with sovereign immunity and the no-interest rule.

In *Brown*, the court held that the Back Pay Act waives the federal government's sovereign immunity from interest in Title VII cases. Brown, 918 F.2d at 218. The court relied upon *Loeffler*, 486 U.S. at 556, for the proposition that a statute other than Title VII can provide the requisite sovereign immunity waiver. *Brown*, 918 F.2d at 216. The court stated, "The government offers no convincing reason why the Back Pay Act does not supply the immunity waiver prescription absent in Title VII, just as the Postal Reorganization Act does." *Id.* The court next held that because the Back Pay Act complements Title VII, the Back Pay Act waives sovereign immunity from interest for any claim which could have been brought under the Back Pay Act.[5] *Id.* at 218.

We find this reasoning unpersuasive. In *Loeffler*, 486 U.S. at 556, the Supreme Court held that Congress expressly waived the postal service's sovereign immunity at its inception because, under the 1970 Postal Reorganization Act, the postal service assumed the role of a "private commercial enterprise." Express and unequivocal Congressional waiver of sovereign immunity was not required in *Loeffler* because the postal service fit within the "private commercial enterprise" exception to the no-interest rule. *Id.* In cases like *Brown* and the present one however, the private commercial enterprise exception does not apply.

We hold that to provide the sovereign immunity waiver absent in Title VII, the separate statute must, at a minimum, unequivocally express Congress's intent to waive sovereign immunity under Title VII. *Cf. McGehee v. Panama Canal Comm'n*, 872 F.2d 1213, 1215 (5th Cir. 1989) (holding that

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[5] In *Brown*, the plaintiffs brought an unlawful failure to promote claim under Title VII and not the Back Pay Act. *Brown*, 918 F.2d at 216. Because the Back Pay Act limits its protections to the unlawful "withdrawal or reduction" of compensation, 5 U.S.C. § 5596(b)(1), and the plaintiffs alleged unlawful failure to promote, the court did not award them any interest from the government. *Brown*, 918 F.2d at 221.

for Congress to waive sovereign immunity by statute, the "legislation giving rise to the cause of action" itself must expressly subject "the government to interest payments").

In this Rehabilitation Act case, Arneson recovered back pay under Title VII's remedial provisions. He did not rely upon the Back Pay Act to recover back pay, but now asserts that the Back Pay Act provides the necessary waiver of sovereign immunity. The Back Pay Act language relied upon by Arneson states that "an amount payable under paragraph (1)(A)(I) of this subsection shall be payable with interest." 5 U.S.C. § 5596(b)(2)(A). The amended Back Pay Act does not even mention Title VII or the Rehabilitation Act. This provision does not evidence Congress's clear and unequivocal consent to interest awards against the government under the Rehabilitation Act and Title VII. Had Congress desired to waive sovereign immunity from interest awards under either the Rehabilitation Act or Title VII, it would not have limited Section 5596(b)(2)(A) interest awards to amounts payable under "paragraph (1)(A)(I)." Congress could also have expressed its intent by amending Title VII before 1991.

The Supreme Court's decisions addressing sovereign immunity and the no-interest rule buttress our holding. The Court has instructed us to construe the scope of such waivers in the sovereign's favor, *see Shaw*, 478 U.S. at 318; to limit such waivers to their plain language, *see Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694, 77 L. Ed. 2d 938, 103 S. Ct. 3274 (1983); and to construe "ambiguities in favor of immunity." *United States v. Williams*, 514 U.S. 527, 531, 131 L. Ed. 2d 608, 115 S. Ct. 1611 (1995). The Back Pay Act does not expressly and unambiguously waive the federal government's sovereign immunity from interest awards under the Rehabilitation Act or Title VII. We therefore reverse the prejudgment interest award to the extent it relies upon the Back Pay Act to waive sovereign immunity.[6]

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[6] In light of this finding, we need not address Arneson's argument that the 1987 Back Pay Act amendment applies retroactively.

B. Tax Enhancement Damages

The district court awarded Arneson additional monies to compensate Arneson for the adverse tax consequences from receiving back pay in two payments (tax enhancement award). The SSA argues that tax enhancement awards are not available under Title VII and that, if available, Congress has not waived sovereign immunity from these awards.

If the tax enhancement remedy is available under Title VII, we find it analogous to the prejudgment interest remedy, *see Manko v. United States*, 830 F.2d 831, 836 (8th Cir. 1987), as an element of making persons whole for discrimination injuries. *See Loeffler*, 486 U.S. at 558. Therefore, we treat the tax enhancement remedy like the prejudgment interest remedy and hold that Congress must expressly and unequivocally waive sovereign immunity before a party can recover a tax enhancement award from the federal government.

We do not believe that Congress has authorized the tax enhancement remedy against the federal government. Nowhere within the statutory framework of the Rehabilitation Act or Title VII, has Congress expressly waived sovereign immunity from tax enhancement damages. The mere fact that Congress intended that discrimination victims receive a full measure of back pay does not amount to an unequivocal and express waiver of sovereign immunity. We therefore reverse the district court's award of tax enhancement damages.[7]

C. Disability Retirement Annuity

After his unlawful discharge, Arneson received Civil Service Retirement System (CSRS) disability retirement benefits (disability benefits) in the amount of $72,241.87. The SSA argues that we should deduct the amount of these

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[7] Because we believe Congress has not unequivocally expressed its intention to waive the federal government's sovereign immunity from this tax enhancement award, we need not decide whether plaintiffs may recover this type of award against private parties.

benefits from Arneson's back pay award because Arneson would otherwise receive a double recovery. We disagree.

The Title VII back pay remedy is limited by 42 U.S.C. § 2000e-5(g), which provides in part, "interim earnings . . . by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." This provision prevents employment discrimination victims from recovering twice for the same injury. The SSA argues that Arneson's disability benefits constitute interim earnings.

Because the National Labor Relations Act provides the model for the Title VII back pay remedy, *see Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 82 (3d Cir. 1983), we find the Court's decision in *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 95 L. Ed. 337, 71 S. Ct. 337 (1951) particularly relevant to this issue.

The common law collateral source rule holds that the defendant's liability shall not be reduced merely because the plaintiff's net damages are reduced by payments received from others. *See Gullett Gin*, 340 U.S. at 364. In *Gullett Gin*, the Court applied the collateral source rule to uphold the National Labor Relations Board's refusal to deduct unemployment benefits from an employee's NLRA back pay award for unlawful discharge. *Id.* The Court held that the unemployment benefits at issue were collateral because they were not direct benefits from the employer and they were made "to carry out a policy of social betterment for the benefit of the entire state." *Id.*

We have previously addressed this issue under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621. *See, e.g., Smith v. World Ins. Co.*, 38 F.3d 1456, 1465 (8th Cir. 1994). In *Smith*, we refused to reduce an ADEA back pay award by pension benefits received on account of the employee's wrongful discharge and remanded the case to determine whether "the award of backpay includes amounts designed to put [the employee's] pension account in the same position as though he were never discharged." *Id.* at 1466.

We affirm the district court's refusal to deduct Arneson's disability benefits from his back pay award because these benefits were from a collateral source and should not be considered interim earnings.[8] *Cf. Eichel v. New York Central R.R. Co.*, 375 U.S. 253, 254, 11 L. Ed. 2d 307, 84 S. Ct. 316 (1963) (stating "respondent does not dispute that it would be highly improper for the disability pension payments to be considered in mitigation of" petitioner's damages). We believe Arneson's back pay award does not include monies for disability pension contributions that the SSA would have made but for Arneson's wrongful termination. Moreover, the disability benefits do not come entirely from Arneson's employer because Arneson has unquestionably contributed to his CSRS disability retirement fund. Finally, the payments to Arneson from the CSRS disability fund were made to carry out a social policy wholly independent of back pay awards and they did not discharge any direct obligation that the SSA had to Arneson. *See Gullett Gin*, 340 U.S. at 364.

D. Attorney's Fees and Costs

The district court awarded Arneson attorney's fees totaling $178,610 and other costs totaling $9,381.13. The SSA argues that Arneson should not recover the fees and costs related to any issues that Arneson loses on appeal because Arneson would no longer be the prevailing party with respect to those issues. We agree.

Under Title VII, the district court may, in its discretion, award "the prevailing party" a "reasonable attorney's fee

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[8] This case is distinguishable from *Beshears v. Asbill*, 930 F.2d 1348 (8th Cir. 1991). *Beshears* involved an employee that received disability benefits due to injuries which were unrelated to his unlawful discharge. *Id.* at 1355. Thus we adopted the test articulated by the Tenth Circuit in *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1158 (10th Cir. 1990), to determine whether the disability benefits received should operate to reduce the employee's wrongful discharge back pay award. *Beshears*, 930 F.2d at 1355. By contrast, Arneson received disability benefits as a result of the government's wrongful termination. Therefore, we do not apply the *Beshears* analysis.

(including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k).[9] In awarding attorney's fees and costs when the plaintiff has only achieved limited or partial success, the court must consider "whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Hensley v. Eckerhart*, 461 U.S. 424, 436, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983).

We find Arneson's post-trial claims for prejudgment interest and a tax enhancement award distinct and unrelated to those that he has prevailed on, *see id.* at 437 n.12, and thus, the district court has the discretion to reduce Arneson's award of costs, including attorney's fees, accordingly. We recognize that "there is no precise rule or formula for making these determinations." *Id.* at 436. However, "[a] request for attorney's fees should not result in a second major litigation." *Id.* at 437. Nonetheless, we remand the case to enable the court most familiar with the litigation to award Arneson a reasonable fee in relation to the results obtained on appeal.

III. CONCLUSION

For the foregoing reasons, we affirm the district court decision in part and reverse in part. We remand the case for a redetermination of interest and costs, including attorney's fees.

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[9] Congress expressly waived the government's sovereign immunity from costs and attorney's fees. 42 U.S.C. § 2000e-5(k) ("The United States shall be liable for costs the same as a private person.").

RELEVANT STATUTORY PROVISIONS

5 U.S.C. § 5596. Back pay due to unjustified personnel action.

(b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowance, or differentials of the employee–

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect–

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that–

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(2) (A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.

(B) Such interest–

(i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;

(ii) shall be computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and

(C) Interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection.

(3) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

(4) For the purpose of this subsection, "grievance" and "collective bargaining agreement" have the meanings set forth in section 7103 of this title and (with respect to members of the Foreign Service) in sections 1101 and 1002 of the Foreign Service Act of 1980, "unfair labor practice" means un unfair labor practice described in section 7116 of this title and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980, and "personnel action" includes the omission and failure to take an action or confer a benefit.

29 U.S.C. § 791. Employment of individuals with disabilities

(b) Federal agencies; affirmative action program plans. Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, with[in] one hundred and eighty days after the date of enactment of this Act, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

29 U.S.C. § 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations.

(a) Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees. No otherwise qualified individual with a disability in the United States, as defined in section 7(8), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Development Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier

than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. § 794a. Remedies and attorney's fees.

(a) with respect to any complaint under section 501 of this Act, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to acnieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act.

(b) In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000e-5 (prior to 1991 amendment). Enforcement provisions.

(g) Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor

organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

42 U.S.C. § 2000e-16 (prior to 1991 amendment). Nondiscrimination in Federal Government employment.

(a) Discrimination prohibited. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(c) Civil action by party aggrieved. Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the

Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Application of certain provisions. The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

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No. 97-1649

In the Supreme Court of the United States

OCTOBER TERM, 1997

STEPHEN A. ARNESON, PETITIONER

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
STEPHANIE R. MARCUS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

8 pp

QUESTIONS PRESENTED

1. Whether the Back Pay Act waives the sovereign immunity of the United States against prejudgment interest on a back pay award under the Rehabilitation Act.

2. Whether the Rehabilitation Act waives the sovereign immunity of the United States against tax enhancement damages that compensate a plaintiff for the tax consequences of receiving back pay in a lump sum rather than as a yearly salary.

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KENNETH S. APFEL,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 51a-60a) is reported at 128 F.3d 1243. The opinion of the district court (Pet. App. 43a-50a) is reported at 958 F. Supp. 443.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1997. On January 28, 1998, Justice Thomas extended the time within which to file a petition for certiorari to and including April 6, 1998. The petition for certiorari was filed on April 6, 1998, and was placed on this Court's docket on April 9, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in employment decisions by the federal government. 29 U.S.C. 791; *Lane* v. *Peña*, 518 U.S. 187, 192-194 (1996). The Rehabilitation Act does not contain its own remedial provisions for claims against the United States. Instead, the statute incorporates the "remedies, procedures, and rights set forth in [Title VII] of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k)." 29 U.S.C. 794a(a)(1).

Title VII provides that a court that finds that an employer has violated the statute may enjoin the violation and "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay" or "any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g)(1). The statute further provides that back pay may not be awarded for any period of time earlier than two years before the date the employee filed a complaint with the relevant agency. See *ibid.*

2. The Social Security Administration (SSA) hired petitioner Stephen A. Arneson in March 1968. Pet. App. 15a. In 1975, petitioner became aware that he suffers from apraxia, a neurological disorder. *Ibid.* Because of his apraxia, petitioner is easily distracted and has trouble concentrating. *Id.* at 16a. Petitioner also has problems understanding spoken and written language and has "poor handwriting skills, poor reading skills and poor organizational skills." *Ibid.*

The SSA made efforts to accommodate petitioner's disability, and, until early 1982, petitioner received satisfactory performance reviews. Pet. App. 16a-17a.

In 1982, however, the SSA informed petitioner several times that his work was unsatisfactory. *Id.* at 17a. In October 1982, the agency advised petitioner to apply for voluntary disability retirement and warned him that, if he failed to do so, he would be discharged. *Ibid.* Petitioner did not apply for voluntary retirement, and the SSA terminated petitioner's employment, effective January 21, 1983, citing approximately 75 instances of unsatisfactory performance. *Ibid.*

3. Petitioner then filed this action, alleging that the SSA violated the Rehabilitation Act when it terminated him. Pet. App. 17a. After holding a trial, the district court entered judgment for the government. *Id.* at 1a-14a. The Eighth Circuit reversed and remanded, directing the district court to consider whether the SSA reasonably could have further accommodated petitioner's apraxia. *Id.* at 15a-27a. On remand, the district court entered judgment in favor of the government. *Id.* at 28a-37a. The court of appeals again reversed, held that petitioner should be reinstated with back pay, and directed the district court to "take evidence on and enter judgment for the amount [of back pay] to be established." *Id.* at 42a.

a. On remand, the district court held that the Back Pay Act of 1966, 5 U.S.C. 5595 *et seq.*, waived sovereign immunity for prejudgment interest accruing from January 21, 1983, on petitioner's back pay award under the Rehabilitation Act; granted an additional award to compensate petitioner for the tax consequences of receiving his back pay in a lump sum; and refused to deduct from the back pay award the Civil Service Retirement System (CSRS) disability retire-

ment benefits that petitioner received during the period of his termination. Pet. App. 43a-50a.[1]

The court held that petitioner is entitled to prejudgment interest on his Rehabilitation Act back pay award because his claim falls within the scope of the Back Pay Act. Pet. App. 44a-46a. Although the court acknowledged that the Rehabilitation Act "does not address the issue of prejudgment interest," and that the waiver of sovereign immunity against interest in the Civil Rights Act of 1991 does not apply retroactively to petitioner's case, it held that the Back Pay Act supplements the relief available under the Rehabilitation Act by waiving the federal government's sovereign immunity against prejudgment interest. *Id.* at 44a-45a. Second, the court held that petitioner was entitled to an enhancement of his back pay award to compensate for the adverse tax consequences caused by receiving his back pay in a lump sum. The court relied on its "wide discretion in fashioning remedies to compensate victims of discrimination." *Id.* at 47a. The court thus awarded petitioner a tax enhancement of $117,803. *Id.* at 48a. The government timely appealed the district court's order and judgment to the Eighth Circuit.

b. The court of appeals reversed in part and affirmed in part. Pet. App. 51a-60a. The court held that the Back Pay Act does not waive sovereign immunity against interest on Rehabilitation Act back pay awards. *Id.* at 52a-56a. The court observed that the

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[1] We do not discuss in this brief in opposition to the petition whether the district court and court of appeals erred by refusing to deduct petitioner's CSRS benefits from his back pay award. See Pet. 9 n.4. That issue has been resolved by a settlement agreement.

Rehabilitation Act "expressly incorporates the 'remedies, procedures and rights' of Title VII" of the Civil Rights Act of 1964. *Id.* at 53a (quoting 29 U.S.C. 794a(a)(1)). And, until November 21, 1991—the effective date of the Civil Rights Act of 1991—Title VII did not waive the government's sovereign immunity against prejudgment interest. See *id.* at 53a-54a (citing *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986)).

Noting that "[i]n this Rehabilitation Act case, [petitioner] recovered back pay under Title VII's remedial provisions" and "did not rely upon the Back Pay Act to recover back pay," the court rejected petitioner's argument that the Back Pay Act contained the requisite waiver of sovereign immunity for interest accruing prior to November 21, 1991. Pet. App. 56a. The court ruled that, under this Court's precedent, the Back Pay Act, which "does not even mention Title VII or the Rehabilitation Act," fails to "expressly and unambiguously waive the federal government's sovereign immunity from interest awards under the Rehabilitation Act or Title VII." *Ibid.* To the contrary, the Back Pay Act provides only that interest is available on "amount[s] payable under paragraph (1)(A)(i)" of the Back Pay Act itself. *Ibid.* The court therefore reversed the district court's decision that petitioner was entitled to prejudgment interest before the effective date of the Civil Rights Act of 1991. *Ibid.*

The court also ruled that the Rehabilitation Act does not waive the sovereign immunity of the United States against tax enhancement damages. Pet. App. 57a. The court reasoned that "[n]owhere within the statutory framework of the Rehabilitation Act or Title VII, has Congress expressly waived sovereign

immunity from tax enhancement damages." *Ibid.* As the court explained, "[t]he mere fact that Congress intended that discrimination victims receive a full measure of back pay does not amount to an unequivocal and express waiver of sovereign immunity." *Ibid.* The court of appeals thus reversed the district court's award of a tax enhancement. *Ibid.*

ARGUMENT

The court of appeals correctly held that the federal government's sovereign immunity bars both prejudgment interest on a back pay award under the Rehabilitation Act and any award for tax enhancement damages. Contrary to petitioner's contention, there is no conflict between the holding of the Eighth Circuit in this case and the holding of any other court of appeals. Any difference in approach that may exist concerning the propriety of prejudgment interest on back pay awards under Title VII and the Rehabilitation Act is of no continuing importance, because Congress amended Title VII in 1991 to authorize prejudgment interest.

I. THE COURT OF APPEALS CORRECTLY HELD THAT SOVEREIGN IMMUNITY BARS BOTH THE PREJUDGMENT INTEREST AND THE TAX ENHANCEMENT DAMAGES SOUGHT BY PETITIONER IN CONNECTION WITH HIS BACK PAY AWARD UNDER THE REHABILITATION ACT.

A. The Back Pay Act Does Not Waive Sovereign Immunity For Interest On Awards Under The Rehabilitation Act

1. The court of appeals correctly held that the Back Pay Act does not waive the sovereign immunity of the United States with respect to interest on back pay awards under the Rehabilitation Act. As this Court has often held, "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text * * * and will not be implied." *Lane* v. *Peña*, 518 U.S. 187, 192 (1996). Moreover, when there are "plausible" readings of a statute that would not authorize monetary relief against the government, "a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992).

That rule of strict construction applies with even greater force in cases involving awards of interest. This Court noted and reaffirmed the "no-interest rule" in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), when it held that Title VII (before enactment of the Civil Rights Act of 1991) did not waive the government's sovereign immunity with respect to interest. The Court explained, "[t]he no-interest rule provides an added gloss of strictness upon these usual rules [that waivers of sovereign immunity must be

strictly construed in favor of the sovereign]." *Id.* at 318.

Although the present case arises under the Rehabilitation Act, *Shaw* applies with equal force here, because the Rehabilitation Act expressly incorporates Title VII's remedial scheme. 29 U.S.C. 794a(a)(1). Thus, prior to 1991, interest awards against the federal government were unavailable under the Rehabilitation Act.

In the Civil Rights Act of 1991, Congress amended Title VII to waive the sovereign immunity of the United States for interest. Section 114 of the Act provides that, in Title VII actions against the federal government, "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." Pub. L. No. 102-166, 105 Stat. 1079 (codified at 42 U.S.C. 2000e-16(d)). Congress did not, however, make that provision retroactive to allow for interest accruing before November 21, 1991, the effective date of the statute.[2] Thus, no interest was available to petitioner under the Rehabilitation Act for the period before November 21, 1991.

2. Petitioner contends that a separate statute—the Back Pay Act—provides the requisite waiver of sovereign immunity, but he is mistaken. The plain language of the Back Pay Act makes clear that its

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[2] Every court of appeals that has addressed the issue since this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), has held that Section 114 does not apply retroactively. See *Brown* v. *Secretary of Army*, 78 F.3d 645, 654 (D.C. Cir.), cert. denied, 117 S. Ct. 607 (1996); *Woolf* v. *Bowles*, 57 F.3d 407, 410 (4th Cir. 1995); *Edwards* v. *Lujan*, 40 F.3d 1152, 1154 n.1 (10th Cir. 1994), cert. denied, 516 U.S. 963 (1995); see also *Huey* v. *Sullivan*, 971 F.2d 1362, 1365-1366 (8th Cir. 1992) (pre-*Landgraf*), cert. denied, 511 U.S. 1068 (1994).

waiver of sovereign immunity for interest does not extend to back pay awards under the Rehabilitation Act. Rather, the Act authorizes interest only on back pay awards made under the Back Pay Act itself: "An amount payable *under paragraph (1)(A)(i) of this subsection* shall be payable with interest." 5 U.S.C. 5596(b)(2)(A) (emphasis added).[3]

As the court of appeals recognized, "[i]n this Rehabilitation Act case, [petitioner] recovered back pay under Title VII's remedial provisions. He did not rely upon the Back Pay Act to recover back pay[.]" Pet. App. 56a. Although petitioner sought *interest* under the Back Pay Act (see Pl. Post-Hearing Memo at 7-8), he did not seek, nor did he receive, *back pay* under the Back Pay Act. In fact, petitioner did not even

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[3] Subsection (b)(1)(A)(i) provides in relevant part:

> An employee of an agency who * * * is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay * * *
>
> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect —
>
> (i) an amount equal to all or any part of the pay * * * which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period.

5 U.S.C. 5596(b)(1)(A)(i).

mention the Back Pay Act until after he had been awarded back pay.[4]

3. Moreover, even if petitioner had sought back pay under the Back Pay Act, he could not have prevailed. The Rehabilitation Act provides the exclusive judicial remedy for federal employees alleging employment discrimination based on disability. *Johnson* v. *United States Postal Service*, 861 F.2d 1475, 1477 (10th Cir. 1988), cert. denied, 493 U.S. 811 (1989); *Gardner* v. *Morris*, 752 F.2d 1271, 1278 (8th Cir. 1985); *Boyd* v. *United States Postal Service*, 752 F.2d 410, 413 (9th Cir. 1985); *McGuiness* v. *United States Postal Service*, 744 F.2d 1318, 1321-1322 (7th Cir. 1984).

Congress designed Title VII as the exclusive judicial remedy for federal employees complaining of employment discrimination. And Congress similarly designed the Rehabilitation Act as the exclusive judicial remedy for federal employees claiming discrimination based on disability. Indeed, the Rehabilitation Act incorporates Title VII's comprehensive remedial scheme "as the exclusive vehicle for judicial remedy of claims of discrimination in federal employment." *Gardner*, 752 F.2d at 1278. As this Court has held, monetary remedies for violations of the Rehabilitation Act are to be found in Section 717 of Title VII or not at all. See *Lane*, 518 U.S. at 192-194.[5]

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[4] Petitioner's complaint does not refer to the Back Pay Act as a source of relief. See Complaint 1-2. Only after the district court awarded petitioner back pay in its Interim Judgment and the government asserted sovereign immunity against interest did petitioner seek further relief under the Back Pay Act.

[5] As petitioner notes (Pet. 14 n.6), some courts have held that a plaintiff can also sue the federal government for employment discrimination under Section 504 of the Rehabilitation Act. Title VI of the Civil Rights Act of 1964, rather than Title

By incorporating Title VII procedures and remedies in the Rehabilitation Act, Congress created a self-contained statutory scheme for claims of discrimination based on disability in the federal workplace. In fact, for federal employees who claim unlawful discrimination based on disability, the Rehabilitation Act provides its own set of administrative procedures. 29 U.S.C. 794a(a)(1), incorporating 42 U.S.C. 2000e-16(b) and (c). It creates a civil cause of action. 29 U.S.C. 791, 794a(a)(1); see *Lane*, 518 U.S. at 193. It includes a jurisdictional provision. 29 U.S.C. 794a(a)(1), incorporating 42 U.S.C. 2000e-5(f)(3). And, most important for present purposes, it specifies the remedies, including a back pay remedy, that are available under the Act. 29 U.S.C. 794a(a)(1), incorporating 42 U.S.C. 2000e-5(g).

Those detailed, specific and comprehensive provisions demonstrate that Congress did not intend Title VII and Rehabilitation Act plaintiffs to look to other statutes for their remedies. In *Brown* v. *General Services Administration*, 425 U.S. 820, 835 (1976), this Court held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." The Court rested that conclusion on

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VII, provides the remedial structure for *some* violations of Section 504. See 29 U.S.C. 794a(a)(2) (remedies of Title VI available for violations by "any recipient of Federal assistance or Federal provider of such assistance"). This Court made clear in *Lane*, 518 U.S. at 192-194, however, that Section 501, which incorporates Title VII's remedies, is the exclusive source of monetary relief in Rehabilitation Act actions against the federal government as employer. See 518 U.S. at 193 (waiver of sovereign immunity against monetary damage awards is only for "the narrow category of § 504 violations committed by federal funding agencies acting as such").

the "balance, completeness and structural integrity" of Title VII. See *id.* at 832. The Court reaffirmed the exclusivity of the Title VII remedial scheme in *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979), a case that is closely analogous to this one. In *Novotny*, the Court held that the rights created by Title VII could not be asserted within the remedial scheme of another statute, 42 U.S.C. 1985(3). Because Title VII includes its own cause of action and its own administrative and judicial remedies, see *id.* at 373-376, the Court held that the remedies of 42 U.S.C. 1985(3) are not available to a Title VII claimant.[6]

The present case is analogous. Through its incorporation of Title VII, the Rehabilitation Act provides its own exclusive back pay remedy. Thus, under *Brown* and *Novotny*, petitioner may receive only the remedies provided by the Rehabilitation Act.

Indeed, the provisions of Title VII relating to back pay illustrate why this Court has repeatedly recognized the exclusivity of the remedial scheme. The Title VII back pay remedy is more limited than that provided by the Back Pay Act. The Back Pay Act provides for back pay during the *entire* period of an unjustified personnel action. See 5 U.S.C. 5596(b)(1)

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[6] Contrary to petitioner's contention (Pet. 12), the decision in *Novotny* rested not only on a concern that plaintiffs might otherwise circumvent Title VII's administrative process but also on the concern that they might seek improperly to supplement its limited remedies. After observing that "[i]f a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of [Title VII's] detailed and specific provisions," the Court noted that, unlike Title VII, "Section 1985(3) expressly authorizes compensatory damages; punitive damages might well follow." 442 U.S. at 375-376.

(A). Title VII, in contrast, limits back pay to a period beginning no earlier than two years before the date that the employee files a complaint with the relevant federal agency. See 42 U.S.C. 2000e-5(g). It would make no sense for Congress to provide federal employees with a specific and limited back pay remedy under Title, VII and the Rehabilitation Act if Congress intended that prevailing federal employees under those anti-discrimination statutes would also be eligible to receive more generous back pay under the Back Pay Act. Accordingly, because Congress had not waived sovereign immunity for interest on Rehabilitation Act back pay awards until it passed the 1991 Civil Rights Act, petitioner is not entitled to interest on his back pay award until November 21, 1991.[7]

4. Petitioner argues (Pet. 10) that interest is nonetheless available under the Back Pay Act because he has met that statute's conditions—*i.e.*, he has been "found by appropriate authority under applicable law * * * to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of [his] pay." As demonstrated above, however, peti-

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[7] Although, as petitioner notes (Pet. 13-15), the Equal Employment Opportunity Commission formerly held a different view, the Commission no longer espouses that view. See 57 Fed. Reg. 12,641-12,642 (1992) (current regulations provide that interest is available only "where sovereign immunity has been waived," *e.g.*, by the Postal Service Reorganization Act or by Title VII for awards based on conduct after November 21, 1991). In any event, this Court grants certiorari to resolve conflicts among the courts of appeals or state courts, see Sup. Ct. R. 10(a), not to settle disagreements among federal agencies.

tioner's argument ignores basic sovereign immunity principles and the exclusivity of the Rehabilitation Act back pay remedy and thus must be rejected.

Petitioner's contention also ignores the relationship between the Back Pay Act and the anti-discrimination statutes. The Back Pay Act applies to cases in which federal employees challenge a personnel action under a collective bargaining agreement or the civil service laws. See *Roepsch* v. *Bentsen*, 846 F. Supp. 1363, 1371 (E.D. Wis. 1994) (Back Pay Act does not apply to civil rights violations; "[i]t makes no logical, historical, or interpretive sense to graft the provisions of the Back Pay Act onto the civil rights statutes"). Congress passed the Back Pay Act in 1966. See Pub. L. No. 89-380, 80 Stat. 94. As its language makes clear, the Back Pay Act was confined to "withdrawal[s] or reduction[s]" in pay. See 5 U.S.C. 5596(b)(1)(A). It did not, therefore, apply to large numbers of personnel actions—for example, discriminatory failures to promote—that today are forbidden by Title VII and other anti-discrimination statutes. See 5 U.S.C. 5596(b)(1); *United States* v. *Testan*, 424 U.S. 392, 406-407 (1976). At the time of the Back Pay Act's passage, Title VII did not apply to the federal government, and the Rehabilitation Act had not yet been enacted.

When it extended Title VII to the federal government, Congress created a self-contained, exclusive statutory scheme for claims of discrimination in the workplace. See *Brown v. GSA*, *supra*; *Novotny*, *supra*. And when Congress amended the Back Pay Act in 1987 to provide for interest, Congress did *not* provide for interest on all back pay awards against the United States but instead provided for interest only on those amounts payable under Section

5596(b)(1)(A)(i) of the Back Pay Act. See pages 8-9, *supra*. Because this Court had already decided *Brown* and *Novotny*, Congress presumably did not intend the Back Pay Act's interest provision to apply to Title VII or Rehabilitation Act awards. See *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34-35 (1995). Indeed, when Congress intended to provide for interest on back pay awards under Title VII and the Rehabilitation Act, it did so by expressly amending Title VII. See page 8, *supra*.

5. To support his argument that the requisite waiver of sovereign immunity can be found in the Back Pay Act, petitioner relies (Pet. 11-12) on *Loeffler* v. *Frank*, 486 U.S. 549 (1988). *Loeffler* is inapposite, however, because the separate statute that provided the waiver of sovereign immunity in that case was the Postal Reorganization Act. 486 U.S. at 554. The Postal Reorganization Act waives the United States' sovereign immunity with respect to actions against the Postal Service because it contains a "sue and be sued" clause. *Id.* at 556.

In *Loeffler*, the Court thus distinguished the Postal Service from other federal agencies, such as the Library of Congress in *Shaw* (and the SSA in this case), because in creating the Postal Service, Congress "cast off the cloak of sovereignty" and gave the Postal Service the "status of a private commercial enterprise." 486 U.S. at 565 (quoting *Shaw*, 478 U.S. at 317 n.5). Because Congress had "launched [the Postal Service] into the commercial world," the Court held that the *Shaw* "no-interest rule" was "inapplicable." *Id.* at 564-565. Because the government is not

operating a commercial venture through the SSA, *Loeffler* is inapplicable to this case.[8]

B. The Rehabilitation Act Does Not Waive Sovereign Immunity For Tax Enhancement Damages

Basic principles of sovereign immunity make clear that Congress did not waive the federal government's sovereign immunity for tax enhancements to compensate for adverse tax consequences suffered because of the delayed payment of salary under the Rehabilitation Act or Title VII. As this Court recently explained, "[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192. Because neither Title VII nor the Rehabilitation Act expressly authorizes tax enhancements, Congress has not waived the government's sovereign immunity for such monetary relief. *Nordic Village*, 503 U.S. at 34, 37; see *United States* v. *King*, 395 U.S. 1, 4 (1969) (a waiver of sovereign immunity for a particular

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[8] To be sure, *Loeffler* establishes that, under certain circumstances, a waiver of sovereign immunity contained in a separate statute can enlarge the scope of relief available against a federal agency under Title VII. But the waiver of immunity against interest in the Back Pay Act does not do so, for the reasons we have explained above: The waiver of immunity in the Back Pay Act applies only to awards under the Back Pay Act itself, and Title VII's remedial scheme may not be supplemented by the Back Pay Act's remedies. See pages 8-9 and 10-13, *supra*. Nothing in *Loeffler* casts doubt on either of those propositions. *Loeffler* did not involve the Back Pay Act at all, and the Court in *Loeffler* made clear that the plaintiff in that case was relying on the cause of action and remedies provided by Title VII itself. See 486 U.S. at 564-565.

remedy "cannot be implied but must be unequivocally expressed").[9]

Indeed, petitioner has failed to cite a single case in which a court has awarded a tax enhancement against the federal government under Title VII or the Rehabilitation Act. There is thus no reason for this Court to review the Eighth Circuit's decision. To the extent that there is any disagreement among the courts of appeals "over whether Title VII authorizes tax enhancements" against private defendants (Pet. 28), that disagreement is not presented by the decision in this case, because that decision is based solely on the sovereign immunity of the United States. See Pet. App. 57a.[10] Any uncertainty regarding whether tax enhancement damages are available against private parties only reinforces the correctness of the court of appeals' decision. As this Court has explained, the

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[9] Petitioner's assertion (Pet. 24) that "[t]he decision below conflicts with this Court's repeated admonition that Title VII makes the identical remedies available to public and private employees" is directly refuted by this Court's decision in *Shaw*, *supra*. In *Shaw* this Court held that Title VII did not waive the government's traditional immunity from interest, nor did it waive immunity from other methods of compensating for delay in the receipt of funds. 478 U.S. at 317-323. The tax enhancement damages that petitioner seeks in this case, like interest and like the "delay factor" at issue in *Shaw*, are "designed to compensate for the belated receipt of money," *id.* at 322, and are barred by sovereign immunity.

[10] Contrary to petitioner's suggestion (Pet. 28 n.17), the government did not take the position below that tax enhancement damages are unavailable in private party cases. In fact, the government relied on sovereign immunity principles and noted that the district court's discretion "in fashioning remedies to compensate victims of discrimination" (Pet. App. 47a) is limited in claims against the United States. See Gov't C.A. Br. 29.

fact that a statute can be plausibly read *not* to allow such monetary relief "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." *Nordic Village*, 503 U.S. at 37.

It is therefore clear that Congress did not waive the sovereign immunity of the United States against tax enhancement damages under the Rehabilitation Act or Title VII.

II. THERE IS NO CLEAR CONFLICT IN THE CIRCUITS WITH RESPECT TO INTEREST ON BACK PAY AWARDS, AND, IN ANY EVENT, THE ISSUE HAS BEEN RESOLVED BY SUBSEQUENT LEGISLATION

Contrary to petitioner's suggestion (Pet. 16), the decision of the Eighth Circuit denying pre-1991 interest on back pay in this case does not stand in clear conflict with the decisions of other courts of appeals stating that the Back Pay Act waives sovereign immunity from interest on certain back pay awards under Title VII and the Rehabilitation Act. That proposition was not necessary to the holdings of the decisions cited by petitioner, and thus no clear conflict exists. Moreover, because Congress has expressly waived sovereign immunity for interest on back pay awards for periods after November 21, 1991, any apparent conflict relating to prior periods does not warrant this Court's review.

In *Brown* v. *Secretary of Army*, 918 F.2d 214, 218 (1990), cert. denied, 502 U.S. 810 (1991), the D.C. Circuit stated that "the Back Pay Act, to the extent of its coverage, waives the federal government's sovereign immunity against prejudgment interest on Title VII back pay awards." That statement, how-

ever, was not necessary to the decision of the case before the court. In *Brown*, the court held that the employee could not rely on the Back Pay Act for prejudgment interest because the Back Pay Act applies only to adverse personnel actions that reduce or withdraw an employee's pay, and not to the failure to promote an employee, which was the basis for the claim in that case. See 918 F.2d at 218-221.[11]

Without independent analysis, the Tenth Circuit followed the D.C. Circuit both in pronouncing that the Back Pay Act waived sovereign immunity for interest on back pay awards under Title VII and in finding the Back Pay Act inapplicable to the claim at hand. *Edwards* v. *Lujan*, 40 F.3d 1152, 1154 (10th Cir. 1994), cert. denied, 516 U.S. 963 (1995). And, in *Woolf* v. *Bowles*, 57 F.3d 407, 411 (1995), the Fourth Circuit, while declaring the Back Pay Act a waiver of immunity for prejudgment interest in some circumstances, followed *Brown* and *Edwards* in finding it inapplicable to the case at hand. Thus, the holdings of those three circuits—that the government was not required under the Back Pay Act to pay interest to the plaintiffs—do not conflict with the Eighth Circuit's decision in this case.

Moreover, since the *Brown* decision, relevant sovereign immunity law has developed in ways that make it unclear that the D.C. Circuit would still reach the same conclusion on the scope of the Back Pay Act. In *Brown*, the D.C. Circuit relied on *Loeffler* to support its conclusion that the requisite

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[11] Although, as petitioner notes, the D.C. Circuit reaffirmed *Brown*'s interpretation of the Back Pay Act in *Lee* v. *Baker*, 957 F.2d 912 (1992) (Table), *Lee* is an unpublished opinion, which cannot be cited as precedent. See D.C. Cir. R. 28(h).

waiver of sovereign immunity could be found in a statute other than Title VII. 918 F.2d at 216. But, as another panel of the D.C. Circuit recently recognized, since it decided *Loeffler*, this Court has clarified that the sue-and-be-sued clause in the Postal Reorganization Act "is a specific exception to the general rule that a waiver of sovereign immunity must be construed strictly in favor of the sovereign." *Department of Army* v. *FLRA*, 56 F.3d 273, 278 (D.C. Cir. 1995) (citing *Nordic Village*, 503 U.S. at 34). As this Court explained in *Nordic Village*, "[w]e have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent, * * * as in the context of equally broad 'sue-and-be-sued' clauses." 503 U.S. at 34. Thus, contrary to the analysis in *Brown*, 918 F.2d at 216, it is now clear that the Back Pay Act does *not* waive sovereign immunity "just as the Postal Reorganization Act does," because the Back Pay Act does not contain an analogously broad waiver. See pages 8-9, 15-16 & n.8, *supra*.

Even if there were a true conflict among the holdings of the courts of appeals, review by this Court would not be warranted, because, after *Brown* was decided, Congress amended Title VII to waive expressly the federal government's sovereign immunity against prejudgment interest in Title VII and Rehabilitation Act cases. See page 8, *supra*. The D.C. Circuit, when it decided *Brown*, did not have the opportunity to consider that, when Congress wanted to waive sovereign immunity against interest on Title VII back pay awards, it did so expressly in Title

VII itself.[12] Moreover, because of the 1991 amendment, the Eighth Circuit's decision in the present case will have limited future impact. Any purported conflict among the courts of appeals will not affect whether interest is available in cases based on conduct occurring on or after November 21, 1991, the effective date of the amendment.

Petitioner implicitly acknowledges (Pet. 3, 20-21) the limited importance of the purported conflict for cases under Title VII and the Rehabilitation Act. He asserts (Pet. 3, 22-23), however, that "the division of authority created by the decision below * * * has substantial continuing import for age discrimination plaintiffs" because the Civil Rights Act of 1991 does not waive sovereign immunity from interest in Age Discrimination in Employment Act (ADEA) cases.

Petitioner's argument is unpersuasive. If the question of ongoing significance is the availability of interest on ADEA awards, the Court should grant review in an ADEA case to resolve that question. Although the United States believes that interest is not available on awards under the ADEA for the same reasons that it was unavailable under Title VII and the Rehabilitation Act before the 1991 Act, there are differences between the remedial provisions of the ADEA and Title VII. Most notable is the difference upon which petitioner relies: the 1991 Act specifically provides for interest in Title VII and Rehabilitation Act cases but does not provide for interest in cases brought under the ADEA. Rather than granting

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[12] Although the Tenth Circuit decided *Edwards* and the Fourth Circuit decided *Woolf* after the 1991 Act, those courts did not engage in any independent analysis of the relevant issue, as we explained at page 19, *supra*.

review in the present Rehabilitation Act case, this Court should therefore await the possible development of a conflict among the courts of appeals on the availability of interest in ADEA cases.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
STEPHANIE R. MARCUS
Attorneys

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[13] Petitioner's argument (Pet. 20-21) that certiorari is warranted because, in Title VII and Rehabilitation Act cases arising from conduct prior to November 21, 1991, federal agencies do not award interest in the administrative process, while some courts have held that interest is available, suffers from the same defects. Under the Civil Rights Act of 1991, both the administrative and judicial branches may award prevailing plaintiffs interest in Title VII and Rehabilitation Act cases that arise on or after November 21, 1991.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Stephen A. Arneson,

Petitioner,

v.

Kenneth S. Apfel,
Commissioner of Social Security,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY OF THE PETITIONER

Thomas C. Goldstein
BOIES & SCHILLER LLP
5301 Wisconsin Ave., NW
Suite 570
Washington, DC 20015
(202) 237-5677

David J. Newburger
(Counsel of Record)
NEWBURGER &
VOSSMEYER
One Metropolitan Square
Suite 2400
St. Louis, MO 63102
(314) 436-4300

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REPLY OF THE PETITIONER

Only two arguments made in the Brief in Opposition merit substantial attention. First, the Eighth Circuit's decision conflicts with *Brown v. Secretary of the Army* (918 F.2d 214 (CADC), *cert. denied*, 502 U.S. 810 (1991)) and its progeny, and that conflict can only be resolved by this Court. Second, this case involves the proper construction of the *Back Pay Act*, not Title VII or the Civil Rights Act of 1991 ("CRA"). Because the Back Pay Act applies to all manner of cases, including cases under the Age Discrimination in Employment Act, the question presented has substantial continuing significance. The Petition for Certiorari therefore should be granted.

THE CIRCUITS ARE DIVIDED OVER WHETHER THE BACK PAY ACT AUTHORIZES INTEREST UNDER THE ANTI-DISCRIMINATION STATUTES

1. The circuits are divided over whether the Back Pay Act authorizes the award of interest to prevailing plaintiffs under the anti-discrimination statutes. Then-Judge Ginsburg's opinion for the D.C. Circuit in *Brown v. Secretary of the Army* held that interest is available when the terms of the Back Pay Act are satisfied. The Fourth and Tenth Circuits subsequently agreed in cases brought under the ADEA and Title VII (*Edwards v. Lujan*, 40 F.3d 1152 (CA10 1994), *cert. denied*, 516 U.S. 963 (1995); *Wolff v. Bowles*, 57 F.3d 407 (CA4 1995)), as have seven different district courts (*see* Pet. 18). The Eighth Circuit, by contrast, ruled in this case that interest is not available because it found "the reasoning in those cases inconsistent with sovereign immunity and the no-interest rule." Pet. App. at 54a-56a.[1]

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[1] Respondent contends that Petitioner sought interest, but not back pay, under the Back Pay Act. BIO 9. Whatever its merits, Respondent correctly does not argue that its assertion makes this case an inappropriate vehicle to resolve the question presented. The plaintiffs in *Brown*, *Edwards*, and *Wolff* similarly sought back pay under Title VII and the ADEA rather than the Back Pay Act.

2. Both the D.C. Circuit and D.C. District Court repeatedly have deemed *Brown*'s conclusion that interest is available when the terms of the Back Pay Act are satisfied to be binding precedent, not "dictum" as Respondent erroneously asserts. In *Brown* itself, "[t]he government principally argue[d]" (918 F.2d at 216) that the Back Pay Act's interest provision does not apply to back pay awards under the anti-discrimination statutes, and the court rejected that argument only after extensive analysis (*id.* at 216-18) as the government explained in the Brief in Opposition in *Brown* itself:

> At the outset, the court *rejected* the government's contention that the Back Pay Act may not be employed in Title VII actions to supplement the relief authorized by Title VII itself. The court *ruled* that the two statutes "are most sensibly read as complementary" and that "the Back Pay Act, to the extent of its coverage, waives the federal government's sovereign immunity against prejudgment interest on Title VII back pay awards."

BIO, *Brown v. Stone*, No. 90-1733, at 3 (emphasis added).

Moreover, Respondent does not dispute that "[t]he government's subsequent effort to persuade the D.C. Circuit to abandon the holding of *Brown* was rebuffed." Pet. 17. In *Lee v. Baker*, the D.C. Circuit granted the plaintiff's motion for summary affirmance of the district court's decision awarding interest (741 F. Supp. 990 (D.D.C. 1990)) on the basis of *Brown*. We are not relying on the D.C. Circuit's unpublished opinion that "[w]e find meritless the Secretary's submission that an essential element of the court's reasoning in *Brown* constitutes dictum" (1992 U.S. App. LEXIS 9052). Instead, the compelling point is that the D.C. Circuit could summarily affirm only because the holding of *Brown* satisfied the plaintiff's "*heavy burden* of establishing that the merits of his case are *so clear* that expedited action is justified." *Taxpayers Watchdog v. Stanley*, 819 F.2d 294, 297 (1987) (D.C. Circuit's accepted statement of summary affirmance standard) (emphasis added).

The D.C. District Court has held that the Back Pay Act authorizes interest awards under the anti-discrimination statutes in

six different cases (decided by five different judges)[2] and has never agreed with the contrary analysis applied by the Eighth Circuit. In *Gubisch v. Brady*, the government actually *conceded* that interest was available under *Brown* but argued that *Brown* was "erroneous" and should be "diregard[ed] or overturn[ed]." No. 88-2031 (JHG), 1992 U.S. Dist. LEXIS 4814, at *3 n.1 (D.D.C. Apr. 15, 1992). After the district court awarded the plaintiff interest, the agency filed a notice of appeal but subsequently *withdrew the appeal* in light of the D.C. Circuit's summary affirmance in *Lee*. Order Granting Appellant's Mo. To Dismiss Appeal, No. 92-5231 (CADC July 2, 1992). In *Lander v. Lujan*, in which the government had argued that this holding of *Brown* was "dictum" (1991 U.S. Dist. LEXIS 18921, at *8 (D.D.C. Dec. 23, 1991)), the government did not even bother to appeal the district court's decision rejecting that argument and awarding interest.[3]

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[2] *Gubisch v. Brady*, No. 88-2031 (JHG), 1992 U.S. Dist. LEXIS 4814 (D.D.C. Apr. 15, 1992); *Lander v. Lujan*, No. 85-3833 (JGP), 1991 U.S. Dist. LEXIS 18921 (D.D.C. Dec. 23, 1991); *Lee v. Baker*, 741 F. Supp. 990 (D.D.C. 1990); *Trout v. Garrett*, 56 Empl. Prac. Dec. (CCH) ¶ 40,753 (D.D.C. 1990), *subsequent opinion*, 780 F. Supp. 1396 (D.D.C. 1991); *Mitchell v. Secretary of Commerce*, 715 F. Supp. 409 (D.D.C. 1989); *Brown v. Marsh*, 713 F. Supp. 20 (D.D.C. 1989).

[3] Nor has there been any intervening change in the law. A *parenthetical* in *Department of Army v. FLRA* (56 F.3d 273, 278 (CADC 1995)) cites a single clause in a single sentence in the background discussion of sovereign immunity in *United States v. Nordic Village* (503 U.S. 30, 34 (1992)) for the proposition that "sue-and-be-sued clauses" are "a specific exception to the general rule that a waiver of sovereign immunity must be construed in favor of the sovereign." *Nordic Village* simply reiterated settled law on this point. But even more important, this Petition has nothing to do to with sue-and-be-sued clauses. *Brown* cites *Loeffler v. Frank* (486 U.S. 549 (1988)) not for any proposition involving sue-and-be-sued clauses, but instead for the proposition that a separate statute can waive the government's sovereign immunity from interest. 918 F.2d at 216. Respondent does not even dispute this interpretation of *Loeffler*: "To be sure, *Loeffler* establishes that, under certain circumstances, a waiver of sovereign immunity contained in a separate statute can enlarge the scope of relief available against a federal agency under Title VII." BIO 16 n.8. Moreover, the government's appeals to the D.C. Circuit in *Lee* (which it lost) and *Gubisch* (which it abandoned) both came *after* this Court decided *Nordic Village*, and neither the D.C. Circuit nor the *three* other circuits that have addressed this question subsequent to *Nordic Village* – the Fourth Circuit in *Edwards*, the Tenth Circuit in *Wolff*, and the Eighth Circuit in this case – have found this purported development in the law even worth mentioning. To the extent that Respondent suggests that the

3. Respondent's basis for disclaiming a conflict with the Tenth and Fourth Circuits' decisions in *Edwards* and *Wolff* – that those decisions adopted the D.C. Circuit's reasoning and conclusion in *Brown* "[w]ithout independent analysis" (BIO 19) – is meritless. *Edwards* and *Wolff* squarely "agree[d] and also adopt[ed] *Brown*'s interpretation of the Back Pay Act." *Edwards*, 40 F.3d at 1154 (quoting *Brown*, 918 F.2d at 218); *Wolff*, 57 F.3d at 410-11 ("[T]he Back Pay Act unquestionably contains an express waiver of the federal government's interest immunity." (citing *Brown* and *Edwards* with approval)); *see also Ward v. Brown*, 22 F.3d 516, 520 (CA2 1994) (citing *Brown* with approval for the proposition that "Back Pay Act waives sovereign immunity against prejudgment interest on Title VII back pay awards"). In those courts, "prejudgment interest is available if a case falls within the coverage of the Back Pay Act" (*Edwards*, 40 F.3d at 1154), and no subsequent opinion from either circuit has ever suggested any disagreement with that conclusion.

THE AVAILABILITY OF INTEREST UNDER THE BACK PAY ACT HAS SUBSTANTIAL CONTINUING SIGNIFICANCE

1. Respondent in passing makes the prudential argument that this Court should not expend its limited resources in resolving the question presented because it lacks continuing significance. But Respondent's premise – that this case will not determine the availability of interest for later plaintiffs – is incorrect, and Respondent acknowledges as much. As framed by both Petitioner and Respondent, the question presented involves the proper construction of the Back Pay Act. Pet. i (whether "the Back Pay Act waives the federal government's sovereign immunity"). Bio i (whether "the Back Pay Act waives the sovereign immunity of the United States"). The Eighth Circuit and Respondent simply read the Back Pay Act differently than the D.C., Fourth, and Tenth Circuits. *E.g.*, Pet. App. 55a-56a

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enactment of the CRA was itself a relevant change in the law, all of these appellate decisions post-date that "development" as well.

(Congress "limited Section 5596(b)(2)(A) interest awards to amounts payable under 'paragraph (1)(A)(i)'"); BIO 9 (parsing terms of § 5596(b)(2)(A)). The Back Pay Act, which is unaffected by Congress' adoption of the CRA, applies in particular to age discrimination cases. *E.g.*, *Edwards v. Lujan*, 40 F.3d 1152 (CA10 1994), *cert. denied*, 516 U.S. 963 (1995); *Roepsch v. Bentsen*, 846 F. Supp. 1363 (E.D. Wis. 1994). The availability of pre-judgment interest, which is a fundamental issue of fair employment practice (*see, e.g., Library of Congress v. Shaw* and *Loeffler v. Frank*), therefore now hangs in the balance not only for many Title VII and Rehabilitation Act plaintiffs, but also for the more than 7000 individuals who file claims against the government each year under the ADEA. *See* Pet. 22.

2. There is no basis for Respondent's assertion that this Court should instead "grant review in an ADEA case to resolve that question." BIO 21. This case governs the availability of interest on ADEA back pay awards directly, not by extension or analogy, and the Court grants certiorari precisely because individual cases have wider application than their specific facts. *E.g.*, Pet. 19 n.9 (government successfully sought certiorari in *Library of Congress v. Shaw* based on a "conflict in principle" between the D.C. Circuit's decision under Title VII and decisions of two other circuits under an *entirely different*, but similarly worded, statute). Respondent expressly acknowledges that "interest is not available on awards under the ADEA for the *same reasons* that it was unavailable under Title VII and the Rehabilitation Act before the [CRA]" (BIO 21 (emphasis added)), *i.e.*, because resolution of the interest issue turns on an interpretation of the Back Pay Act, not any other statute. Respondent also makes precisely our point by noting that the CRA "specifically provides for interest in Title VII and Rehabilitation Act cases but does not provide for interest in cases brought under the ADEA" (BIO 21): ADEA plaintiffs can receive interest only under the Back Pay Act, which gives this case substantial continuing significance.

Our view that this case determines the availability of interest in ADEA cases is not hypothetical or academic. Respondent does

not dispute that the federal courts, the EEOC (in both its statements and its formal regulations), the Department of Justice, and the Comptroller General *all* have determined the availability of interest by resort to the terms of the Back Pay Act, and therefore have applied the exact same analysis in determining the availability of interest in ADEA cases as in Title VII and Rehabilitation Act cases.[4] *See generally* Pet. 22-23 (collecting authorities). In *Edwards* (40 F.2d 1152) and *Roepsch* (846 F. Supp. 1363), for example, the plaintiffs brought claims under *both* Title VII and the ADEA, which the courts appropriately treated identically. Other cases under the ADEA uniformly follow the same approach. *E.g.*, *Rollins v. Bennett*, No. C88-388C, 1988 U.S. Dist. LEXIS 16032 (W.D. Wash. Sept. 15, 1988); *In re Dawes*, 69 Comp. Gen. 469 (1990).

3. Finally, Petitioner reiterates that the question presented also has substantial continuing significance for Title VII and Rehabilitation Act plaintiffs. Respondent does not dispute that a large number of cases alleging pre-CRA conduct are still pending in the federal courts as a result of two special circumstances: (i) the CRA does not apply retroactively (*Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)); and (ii) claims based on pre-amendment conduct frequently were not filed in court until late 1994 and early 1995 because of delays inherent in the administrative scheme (Pet. 21 & n.10). Interest is most critical, of course, in these long-pending cases, and more than 10,000 such claims against the federal government were initiated in 1991 alone.

THE EIGHTH CIRCUIT'S INTERPRETATION OF THE BACK PAY ACT IS ERRONEOUS

1. On the merits, Respondent first argues that the Back Pay Act "authorizes interest only on back pay awards made

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[4] There is no support for Respondent's statement that the EEOC "no longer espouses that view" (BIO 13 n.7). The text accompanying the Federal Register entry cited by Respondent (57 Fed. Reg. 12,641-42 (1992)) is sharply critical of the policy imposed on the EEOC by the Department of Justice. *See generally* Pet. 13-17.

under the Back Pay Act itself: 'An amount payable *under paragraph (1)(A)(i) of this subsection* shall be payable with interest." BIO 9 (emphasis in BIO). Respondent's contention turns on the meaning of "payable" in the phrase "an amount payable under paragraph (1)(A)(i)." Most courts and the EEOC have read "payable" to mean "capable of being paid," and therefore have concluded that interest is available for any back pay award that satisfies the conditions of paragraph (1)(A)(i). *E.g.*, *Brown*, 918 F.2d at 216 (if the plaintiff's claim satisfies the terms of paragraph (1)(A)(i), "sovereign immunity . . . would not appear to block the assessment of prejudgment interest on their back pay awards"). The Eighth Circuit and Respondent, by contrast, read payable to mean an amount actually *paid* under paragraph (1)(A)(i). *See supra*. At the certiorari stage, however, the important point is that the split in the circuits over the meaning of "payable" will be resolved by reference to the text and history of the Back Pay Act itself and that, as a result, this case governs claims under the ADEA just as it does claims under Title VII and the Rehabilitation Act.

Moreover, Respondent is wrong on the merits. The Back Pay Act's history demonstrates that its interest provision applies to all back pay awards that satisfy the conditions of "paragraph (1)(A)(i)," not just those amounts actually *paid* "under paragraph (1)(A)(i)." Congress added the interest provision – with its reference to amounts "payable under paragraph (1)(A)(i)" – in 1987. Pub. L. No. 100-202, sec. 101(m), 101 Stat. 1329 (1987). Prior to that time, substantial regulations interpreting paragraph (1)(A)(i) already existed. Those regulations authorized the EEOC to award back pay pursuant to paragraph (1)(A)(i) on ADEA, Title VII, and Rehabilitation Act claims (all of which the EEOC administers) by providing both that the EEOC was an "appropriate authority" under the Back Pay Act and that the Back Pay Act was triggered by a "discrimination complaint." 46 Fed. Reg. 58,275 (1981), *codified in relevant part at* 5 C.F.R. §§ 550.803(d), 550.804(b). When Congress amended the Back Pay Act in 1987 to authorize interest on "amount[s] payable under paragraph (A)(1)(i)," it is presumed to have intended that the

amendment conform to this long-standing administrative interpretation that "an amount payable under paragraph (1)(A)(i)" included an award of back pay under the ADEA, Title VII, or the Rehabilitation Act. *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920).

2. Respondent's second argument on the merits is that the Back Pay Act's interest provision is inapplicable where "Congress created a self-contained statutory scheme for claims of discrimination.' BIO 11 (citing *Brown v. GSA*, 425 U.S. 820 (1976); *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979)). We addressed this contention (which was not adopted by the Eighth Circuit) in the Petition (Pet. 12-13) and explained that because the Back Pay Act is triggered only *after* a plaintiff establishes liability under the anti-discrimination statutes, it does not permit a plaintiff to circumvent the administrative exhaustion requirements that motivated this Court's holdings in *Brown v. GSA* and *Novotny*. Moreover, as with its first argument on the merits, Respondent's reliance on *Brown v. GSA* and *Novotny* applies fully to age discrimination claims. According to the Office of Legal Counsel's Memorandum: '[T]he *same analysis* that shows that the Back Pay Act may not be used in a Title VII case also teaches that the ADEA serves as the exclusive means by which a federal employee may obtain relief for a violation of the rights created by that statute." OLC Memorandum at 10 (emphasis added). In particular:

> Congress patterned section 15 of the ADEA after section 717 of Title VII, so both sections should be construed consistently. Relying on *Brown* [*v. GSA*], and analogizing the ADEA to Title VII, federal courts have unanimously concluded that Congress intended the ADEA to provide the exclusive remedy for claims of age discrimination in federal employment. Moreover, by analogy to *Novotny*, courts have concluded that general remedial statutes, such as section 1983 and section 1985(3), are unavailable to supplement the ADEA.

OLC Memorandum at 10-11 (collecting cases) (citations omitted). In the time since OLC issued its Memorandum, the federal courts

uniformly have continued to apply *Brown v. GSA* and *Novotny* exactly to the ADEA just as they do to Title VII. *LaFleur v. Texas Dep't of Health*, 126 F.3d 758 (CA5 1997); *Chennareddy v. Bowsher*, 935 F.2d 315 (CADC 1991); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364 (CA4 1989). *See generally* Pet. 22-23.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE EIGHTH CIRCUIT'S DECISION VACATING PETITIONER'S TAX ENHANCEMENT

Respondent does not dispute that if the Court grants certiorari on Question One presented by the Petition (the interest issue) it should also grant certiorari on Question Two (the tax enhancement issue). The Eighth Circuit's analysis of the two questions is directly bound up together. Pet. App. 57a (because tax enhancements are "analogous to the prejudgment interest remedy," "we treat the tax enhancement remedy like the prejudgment interest remedy and hold that Congress must expressly and unequivocally waive sovereign immunity before a party can recover a tax enhancement award from the federal government"); BIO 17 (arguing that tax enhancement is barred by sovereign immunity as analogous to interest).[5] In addition, Respondent does not deny the exceptional importance of this question, given that the Eighth Circuit's decision deprives federal employees of a wide array of relief previously available under Title VII and the Rehabilitation Act. Pet. 27 (treatise collecting

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[5] Even on Respondent's view of this case, Petitioner would be entitled to a tax enhancement as of the effective date of the Civil Rights Act of 1991. Respondent contends that any waiver of the federal government's sovereign immunity from monetary awards in particular must be express. BIO 16. Section 102 of the CRA, however, expressly authorizes the award of monetary damages on Rehabilitation Act claims. 42 U.S.C. § 1981a(a)(2). *Contra* Gov't C.A. Br. at 30 (arguing that tax enhancement is not available under § 102). "Section 102 significantly expands the monetary relief potentially available to plaintiffs who would have been entitled to backpay under prior law [by authorizing a] plaintiff who wins a backpay award [to] also seek compensatory damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994).

twelve different forms of relief not expressly listed in the statute but nonetheless awarded to "make the plaintiff whole").[6]

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Thomas C. Goldstein
BOIES & SCHILLER LLP
5301 Wisconsin Ave., NW
Suite 570
Washington, DC 20015
(202) 237-5677

David J. Newburger
(Counsel of Record)
NEWBURGER & VOSSMEYER
One Metropolitan Square
Suite 2400
St. Louis, MO 63102
(314) 436-4300

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[6] Certiorari also is warranted because the ruling below conflicts with the holdings of several other circuits that the Equal Employment Opportunity Act of 1972 ("EEOA") – which applied Title VII to the federal sector – waives the federal government's sovereign immunity from relief under Title VII and grants federal employees the same rights and remedies as are available in private-sector cases. These circuits recognize that "[b]y adopting the EEOA, Congress intended to minimize differences between private and public employees, *especially judicial barriers of sovereign immunity*." *Greenlaw v. Garrett*, 59 F.3d 994, 999 (CA9 1994) (emphasis added). "Congressional intent determines whether sovereign immunity will apply in suits against the federal government, and as we have emphasized, Congress *clearly intended* that federal employees receive the same rights to sue under Title VII as private sector workers." *Johnson v. Burnley*, 887 F.2d 471, 478 (CA4 1989) (emphasis added). "Indeed, the whole purpose of the 1972 Amendments was to give public employees the same protections against discrimination as those enjoyed by employees in the private sector." *United States v. City of Chicago*, 573 F.2d 416, 423 (CA7 1978)